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The Roots of Legislative Durability

How Information, Deliberation, and Compromise Create Laws that Last

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The Roots of Legislative Durability

How Information, Deliberation, and Compromise Create Laws that Last

by

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The Roots of Legislative Durability

How Information, Deliberation, and Compromise Create Laws that Last

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The University of Texas at Austin, 2016

Supervisor: Bryan Jones

This dissertation poses a simple question: "What makes law last?" My core argument is that when legislators seek out diverse sources of information, engage in deliberation, and reach a substantive compromise, they are more likely to enact durable law. To identify the systematic determinants of legislative durability, I hand-collected a dataset, drawn from the volumes of the United States Code, that documents the longevity of all 268,935 provisions of federal law passed between 1789 and 2012. Based on the combined results of logistic and duration analysis, I find that the most durable provisions are the subject of lengthy deliberation and are voted on before the last moments of a Congressional session. They are normally referred to multiple House and Senate committees and are enacted after Congress has gained institutional experience in a particular policy area. Durable laws also tend to be considered under open rules that facilitate the involvement of all legislators and typically exclude non-germane provisions. Finally, provision level durability is conditional on changes in control of Congress and the public's preferences for a more or less active federal government.

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Chapter 1: Introduction

The central question of this dissertation is "What makes law last?" To answer this question, I identify the political processes that enable Congress to produce the highest quality and most durable political output. I argue that when legislators seek out diverse sources of information, engage in deliberation, and reach a substantive compromise, they pass the most durable law. Durable law avoids being repealed by Congress, struck down by the Supreme Court, or nullified by the Executive. It also resists changes in political conditions and the public's preferences. Durable law is a stabilizing force in the American political system, but not all laws last.

In this chapter, I briefly describe the theory, data, and methods I employ to identify the systematic determinates of legislative durability for federal provisions of law enacted from 1789 to 2012. I use the partial dismantlement of the Banking Act of 1933 to illustrate how the end of legislation is just as important and impactful as its passage. I also discuss the inherent tension between a stable and flexible political system and durable and ephemeral law. I conclude this chapter with a brief preview of the following chapters.

To find out what makes law last, I hand-collected a dataset, drawn from the volumes of the United States Code, that documents the longevity of all 268,935 provisions of federal law passed between 1789 and 2012. This dataset is the only complete record of the evolution of law in the United States. As such, it is a seminal resource for tracking the lives and deaths of individual provisions. My analysis reveals that over twenty percent of all federal law has been repealed or otherwise nullified by Congress, the Supreme Court, or the Executive since the founding of the United States (See Figure 1).

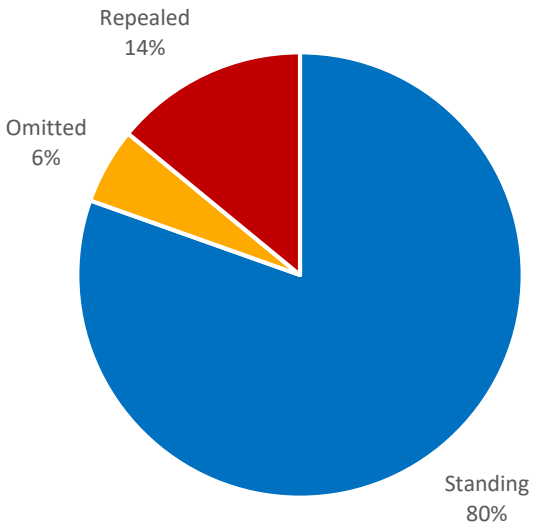


Figure 1: Proportion of Standing, Repealed and Omitted Provisions (1789-2012). Of the 268,935 provisions enacted in legislation between 1789 and 2012, 52,652 have been repealed or omitted.

Despite this substantial rate of repeal and nullification, political scientists, and policymakers know very little about what makes law come to an end and conversely, what makes it durable. To identify the systematic determinates of durability, I will argue for a theory of legislative durability that relies on the political processes at the time of a law's enactment to predict its endurance. The central claim of the theory is that by seeking out diverse sources of information, engaging in deliberation, and reaching a substantive compromise, lawmakers are able to craft higher quality, bipartisan policies. Since politics is a process that unfolds over time, the value of a substantive compromise born of an entropic information search and serious deliberation consists in not only the quality of legislation such a process produces, but in its inoffensiveness to subsequent coalitions. By being both high quality and bipartisan, such laws are more likely to endure.

By focusing on what processes and procedures lawmakers employ to enact more durable law, my research departs from the bulk of prior studies on legislative durability,

which are almost uniformly concerned with the effect of political dynamics, like conditions of unified or divided government, on durability (Ragusa and Birkhead 2016, Jenkins and Patashnik 2012, Glazer 2012, Barry, Burden and Howell 2010, Ragusa 2010, Maltzman and Shipan 2008). As a result of these divergent foci, this dissertation is the first foray into a largely uncharted area of inquiry. While there is a rich and informative literature on changes to congressional lawmaking processes and procedures (Alexander 1916, Polsby 1968, Cooper 1970, Chelf 1977, Polsby 1975, Romer and Rosenthal 1978, Hedlund 1984, Bessette 1994, Binder 2003, Mann and Ornstein 2006, Gutman and Thompson 2012, Sinclair 2012), few scholars have attempted to assess the effect of these changes on the quality or durability of the law it produces.

Because I focus on specific features of the legislative process that increase legislators' access to diverse sources of information, encourage deliberation and enable compromise, I can connect the quality of Congress' deliberative processes to the durability of the law it produces. In the following chapters, I investigate the effect of features of the legislative process including multiple committee referrals, logrolling, omnibus legislation, non-germane provisions, truncated consideration periods, restrictive House rules, and the size and composition of enacting majorities, on legislative durability.

In addition to these unique contributions, I also use survival analysis to assess the degree to which changes in the public's preferences for more or less government and changes in party control of government impact durability. By relating my data on the durability of federal provisions to attributes of the lawmaking process, contemporaneous political conditions, and changes in political conditions over time, the resulting dataset tells the story of the deliberation, passage and eventual fate of all provisions of federal law from the founding of our nation up to the near present.

CHANGES TO THE STATUS QUO

Law is an important organizing principle for both society and the individuals within it. Law governs the nature of our relationship with the state, influences our relationships with each other, allocates authority, enforces norms, declares duties and determines the "rules of the game." Citizens rely on these rules to estimate the costs and benefits of particular courses of action and structure their public and private lives according to its precepts. Law fundamentally shapes the character of a nation and its people.

The rule of law has long been revered as the *ne plus ultra* of good governance by thinkers such as Plato, Aristotle, Livy, Cicero, Harrington, Rutherford, Sidney, Voltaire, Locke, Montesquieu, Kant, and Paine. Among our Founders, John Adams (1774) famously argued that the ideal is a "government of laws, and not of men." Adams believed a government of separated legislative, executive and judicial powers was the best safegaurd for the rule of law because it was least corruptible by the whims and ambitions of men. Due to the persuasive force of arguments favoring nomocracy, the American Founders built the U.S. government on a foundation of separated powers to ensure the rule of law. They designed a constitutional republic that solves problems through the enactment, interpretation and implementation of statutes within a system of separated powers. Since the founding, laws have proliferated touching nearly every aspect of life. However, not all laws last.

Given the importance of statutory law as the governing structure of the U.S., it should come as no surprise that political scientists have devoted considerable resources to investigating legislative enactments. Studies have focused on everything from how issues reach the legislative agenda (Bachrach and Baratz 1962; Kingdon 1984; Baumgartner and

Jones 1993, Cox and McCubbins 1993, 2004, Jones and Baumgartner 2005), to the vagaries of the policy process (Lasswell 1956, Brewer and DeLeon 1983, Sabatier Jenkins-Smith 1993), to how legislators make decisions (Lindblom 1959, Davis Dempster and Wildavsky 1966, Cohen, March and Olsen 1972, Matthews and Stimson 1975, Kingdon 1984, Baumgartner and Jones 1993, Jones and Baumgartner 2005). The clearest indication of the discipline's commitment to rigorously studying lawmaking is the time and effort scholars have put into investigating the contemporaneous dynamics that govern roll-call voting, and hence, the enactment of new legislation (Kingdon 1977, Poole and Rosenthal 1991, Mayhew 1991, Krehbiel 1998, McCarty Poole and Rosenthal 2006, Theriault 2008). In all these cases, scholars are vested in the study of lawmaking because statutes are the primary expression of representation in our republic. They have the potential to reshape the nation's policy commitments and conduct of its citizens.

Since its inception, Congress has enacted laws that have profoundly restructured citizens' expectations of government and reshaped America. In the formative years of the Republic, the ratification of the Louisiana Purchase and the inclusion of new states expanded the nation's territorial reach and set the stage for the eventual confrontation between northern abolitionists and southern slave owners. Even in the midst of the Civil War (1861-1865), Congress passed landmark laws dealing with the "disposition of America's most bountiful resource, its vast holding of public lands" (Johnson 2009). The Homestead Act of 1862 gave millions of acres of federal land to individual settlers, and the Morrill Land-Grant College Act of 1862 offered millions more to the states for the establishment of agricultural and mechanical colleges and universities (Johnson 2009). The States' ratification of the Thirteenth and Fifteenth Amendments, in 1865 and 1869 respectively, abolished slavery and extended the voting franchise to citizens of all races. After the turn of the century, the ratification of the nineteenth amendment extended this

right to women. In its first 130 years, the Republic was transformed by the inclusion of new states and territories and the enfranchisement of blacks and women, all of which was made possible by the legislative enactments that initiated these changes. The next roughly 100 years were not different.

In the shadow of the Great Depression, President Roosevelt worked with Congress to pass his "New Deal" reforms, which, among other things, restructured banking and securities (The Banking Act of 1933 and The Securities Act of 1933), established the first employee protections, encouraged collective bargaining, set a national minimum wage (The National Labor Relations Act of 1935 and The Fair Labor Standards Act of 1938), and guaranteed old age insurance (The Social Security Act of 1935). Building on Roosevelt's successes, President Johnson worked to pass the "Great Society" reforms, including the enactment of the Medicare and Medicaid programs and the passage of the Civil Rights Act of 1964. Eskridge and Ferejohn argue that these and other similar enactments so fundamentally altered citizens' relationship to the government that they constituted the formation of a new small "c" constitutional order. In this new order, citizens' expectations of government have been weighted heavily toward the provision of positive goods, including the assurance of a fair competitive market, protection against poverty because of old age or illness and the conveyance of medical care to the poor and elderly (2010).

Each of these transformative enactments represented a departure from what had been done in the past, a departure from the status quo. As can be said of all laws, they moved policy some distance from the status quo point. That's part of what makes them interesting and explains why political scientists are motivated to expend considerable resources to uncover the processes that guided their development, enactment and impact (Mayhew 1991, Johnson 2009, Eskridge and Ferejohn 2010). However, what if the change

went in the opposite direction? What if the change we observed was of like magnitude, but reverted to the original status quo point? Should we be interested in such a change?

Whenever Congress repeals, or another branch omits law from the extant legal corpus, it constitutes a change that is equal in magnitude to the original enactment, but is a reversion to the original, pre-enactment, status quo point. Additionally, Congress may use repealing laws as vehicles not only to repeal extant provisions but also to replace them with new provisions, leading to the establishment of a new status quo point.[1] Sometimes the practical change from a repeal or nullification is small because the initial law was a small change from the status quo, but sometimes a repeal or other nullification fundamentally reshapes a policy area as much or more than the original landmark enactment.

THE REPEAL OF GLASS-STEAGALL

After the stock market crash of 1929, and the crisis of confidence that followed, President Roosevelt realized his goal to protect society at large from the economic and political power of big banks through the passage of the Banking Act of 1933, better known as Glass-Steagall. This "new legislation reduced the riskiness of the financial system, with a particular emphasis on protecting ordinary citizens," by legally requiring the separation of commercial banking from investment banking (Johnson and Kwak 2010, p. 34). The logic underlying the relatively simple law was that "commercial banks, which handled deposits made by ordinary households and businesses, needed to be protected from failure; investment banks and brokerages, which traded securities and raised money for companies, did not" (Johnson and Kwak 2010). By protecting commercial banks from the systemic

[1] The moment the President signs a bill into law, its provisions take on the force of law. In practice, the Office of Law Revision Council implements provisions in the order in which they appear in the text of newly enacted legislation (OLRC 2014). If Congress repeals and replaces extant law in the same bill, the revision to the original status quo point may be short lived. Congress calls this a "repeal and replacement."

risks imposed by investment banking, Roosevelt and others felt they could avert another disastrous crash.

In the decades following the passage of the Banking Act of 1933, financial institutions made many attempts to subvert its provisions and, for the most part, Congress responded by further constraining bank activities. This pattern began to break down as commercial banks found loopholes allowing them to set up affiliated companies that could deal in securities, which had previously been illegal. More important, after intense and sustained lobbying efforts, the financial industry convinced Congress to strip various provisions of the Banking Act.

Like most acts, the Banking Act of 1933 was only partially dismantled. Popular accounts of the history of financial regulation refer to the repeal of Glass-Steagall and neglect to mention that Glass-Steagall only refers to sections 16, 20, 21, and 32 of the Banking Act of 1933, a law that was never repealed in full (Johnson and Kwak 2010, Pearlstein 2012, Heil 2013, Ritholtz 2014). Other sections of the act included provisions creating the Federal Deposit Insurance Corporation (FDIC) and the Federal deposit insurance system more broadly, as well as regulations concerning the speculative activity of investors.

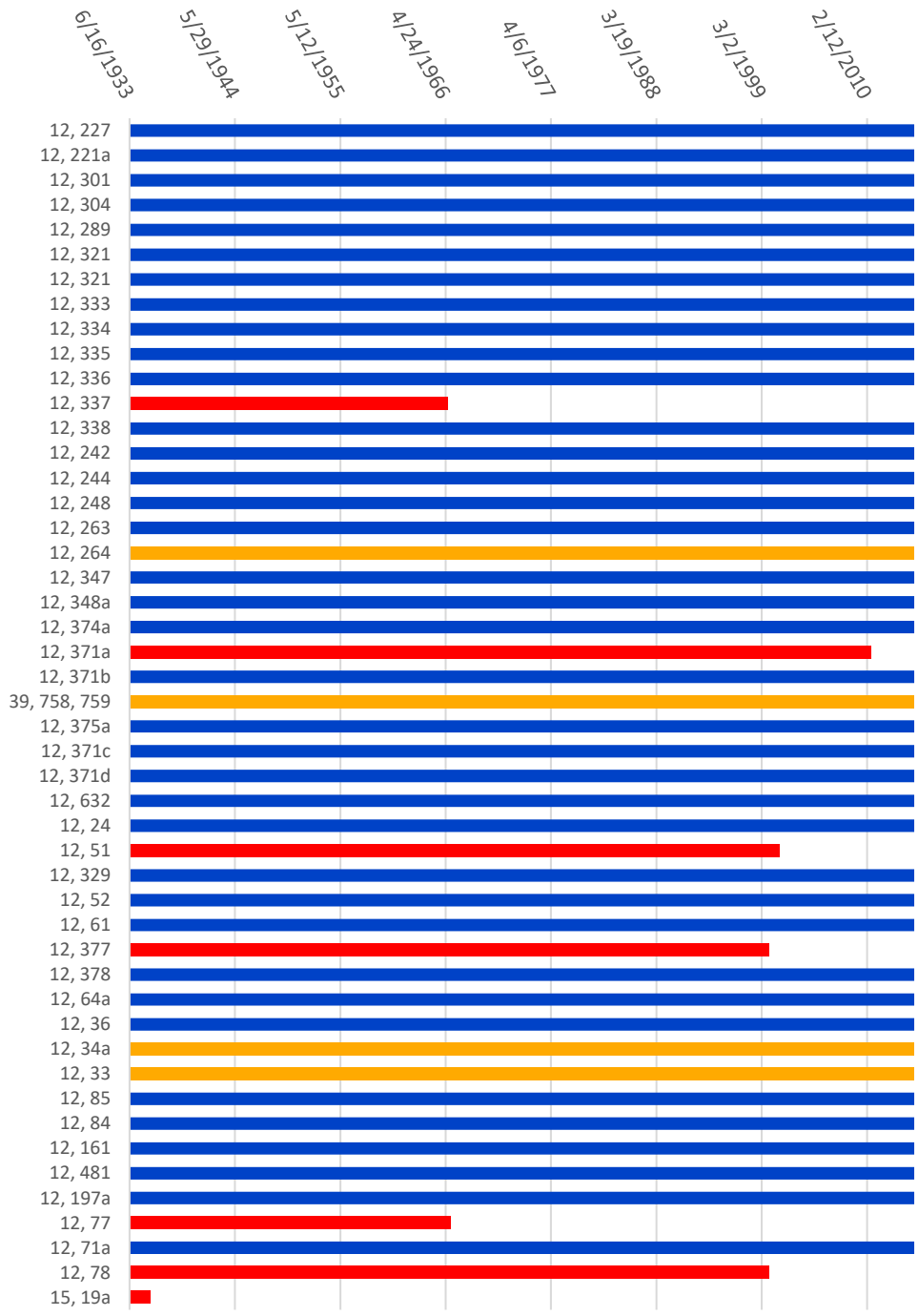


Figure 2: The Banking Act of 1933. The above figure shows the legal status of provisions contained within the act. Standing provisions are blue. Repealed provisions are red. Provisions that are no longer enforced (omitted) are orange.

Dismantling legislation takes time and often proceeds in a piecemeal fashion, with a repeal here and a lack of enforcement there, until the law no longer functions as Congress originally intended. Lawmakers dismantled key sections of the Banking Act of 1933, one provision at a time, over seventy-five years. Just two years after its passage, Congress repealed provisions of this landmark financial regulation law (denoted as red bars in Figure 2). They repealed the first of the seven total provisions repealed in 1935, followed by two in 1966, two in 1999, one in 2000 and the last in 2010. Four additional provisions are no longer enforced (called "omissions" and denoted as orange bars in Figure 2). Of forty-eight original provisions, thirty-seven continue in effect today (denoted as blue bars in Figure 2). The provisions commonly grouped together and referred to as Glass-Steagall, were repealed bit by bit, culminating in the passage of the Gramm-Leach-Bliley Act of 1999, which dealt a death blow to the separation between commercial and investment banks. These repeals allowed banks, securities firms and insurance companies to merge and to sell each other's products (Johnson and Kwak 2011). Predictably, banks took advantage of the newly unconstrained regulatory environment and the financial sector grew larger than ever, giving birth to a new breed of financial institution, the mega bank. These institutions made massive profits by trading in or backing the trade of high risk securities and toxic assets pooled together into complex financial products, whose risk was often not fully disclosed to investors.

Several prominent economists, financial experts and a wealth of commentators have blamed the repeal of Glass-Steagall for causing the Great Recession (Stiglitz 2009, Johnson and Kwak 2010, Pearlstein 2012, Heil 2013, Ritholtz 2014).[2] They argue that the

[2] In hindsight, experts dispute the role that repealing Glass-Steagall played in directly causing the financial crisis of 2008 (Stiglitz 2009, Rickards 2012, Brook and Watkins 2012), but all agree that its repeal, and possible role in inciting the collapse, have fundamentally reshaped the debates surrounding financial regulation.

repeal of these provisions allowed banks to grow large and operate in a relatively unconstrained regulatory environment that was susceptible to systemic risks if any single institution failed. Their worst fears were realized when on September 15, 2008, Lehman Brothers Holding Inc., a global financial services firm, filed for Chapter 11 bankruptcy, setting off the greatest financial crisis since the Great Depression.

The Great Recession triggered a worldwide economic decline; the IMF (2009) called it the worst global recession since World War II. In its wake, the United States Congress heard from panicked "constituents, eager to explain how lack of congressional action to stabilize the markets would result in the immediate or imminent demise of their financial interests on a variety of fronts, including the availability of credit for small businesses, home mortgages and middle class families' financial stability" (Shaffer et al., 2016, p. 10). In response to the severity of the crisis, Congress passed several acts: Emergency Economic Stabilization Act of 2008, also called the Troubled Assets Relieve Program (TARP), a $700 billion financial bailout plan, the American Recovery and Reinvestment Act of 2009, an $830 billion economic stimulus package, and the Dodd–Frank Wall Street Reform and Consumer Protection Act, an act to reform the financial industry on a scale not seen since the enactment of Glass-Steagall.

At the time Congress passed Glass-Steagall in 1933, it was a significant change from the status quo. Its incremental repeal was also a significant reversion to the original, pre-enactment, status quo, which has since been implicated in the one of the largest financial collapses of the last century. If instead, the Glass-Steagall provisions had endured and continued to separate the activities of commercial and investment banks, other forces may still have conspired to create a recession, but the banking system would have been less interconnected and faced less systemic risk, which many argued may have resulted in a shorter and more shallow recession (Kutter 2007, Stiglitz 2009, Johnson and Kwak 2010,

Pearlstein 2012, Heil 2013, Ritholtz 2014). This may be a particularly striking example of the power of repeal to reshape the political landscape, but it is far from the only example.

The Volstead Act, also known as "Prohibition," adopted in 1919, to implement the constitutional amendment prohibiting the manufacture, storage, bottling, transportation and sale of alcohol, was undone fourteen years later by passage of the Blaine Act in 1933, which led to the 21st Amendment. In 1988, Congress passed the Medicare Catastrophic Coverage Act and just over a year later, repealed major elements of it. The act was designed to provide "a measure of social protection against the rising out-of-pocket costs of covered hospital and physician services" and was "funded solely by beneficiary premiums" (Patashnik 2008). Shortly after its enactment, the program faced harsh backlash over the burden its self-financing mechanism would place on the elderly. Observers now remember this landmark law as one of the "shortest-lived pieces of social legislation" in American history (Moon 2006). More recently, the repeal of the military's "Don't ask, don't tell" policy in 2010, allowed openly gay, lesbian or bisexual persons to serve in all branches of the U.S. Department of Defense. These examples are just a few of the well-known repeals, but this inventory falls woefully short of capturing the true scope of the effect of repeals and omissions on the American political system. No other existing data set systematically compiles or analyzes nullifications to federal law.

Dismantling legislation has just as much impact on our political and social system as enacting legislation. To the extent that we care about the politics and process of enacting laws, we should care about the politics and process of dismantling laws. The passage of laws and repeal or omission of their provisions are two sides of the same coin. Both change the status quo and the governing structure. By passing new laws or nullifying existing ones, Congress can either subtly or dramatically change the structure of rules that citizens reply upon to inform decisions and navigate the world as members of an organized society. It is

precisely because of the laws' importance that political scientists have devoted considerable effort to determining how and why laws come into being. However, these inquiries are usually "promptly suspended the moment a law is enacted" (Barry, Burden and Howell 2010, p. 2). A small cadre of scholars have begun investigating what happens to law after it is enacted. Instead of investigating how laws come into being, these scholars are investigating why they die, and conversely, what makes them last. This dissertation aims to make a considerable contribution to the furtherance of these inquiries.

DURABILITY VERSUS FLEXIBILITY

Given the enormous potential effects of both enactments and repeals, the foregoing discussion naturally suggests questions about the value of durable versus ephemeral law. There is an inherent tension between these goals of adaptability and durability. In theory, you want a political system that produces high-quality laws that are therefore mostly stable and predictable, but you also want a built-in agility to adapt to changing circumstances.

Within the context of U.S. lawmaking, sunset provisions are increasingly serving as a way to build in agility to the extant legal corpus. Some laws, particularly those containing sunset provisions, are passed with the intent that they be flexible and provide only short-term fixes for pressing problems rather than enduring solutions (Adler and Wilkerson 2010). By design, Congress periodically reexamines these laws, giving lawmakers an opportunity to repeal, rewrite or omit funding for particular provisions to increase efficiency and effectiveness. Sunset provisions serve as a formal mechanism by which Congress signals its intent to revisit past law.

Legislators can choose to utilize this mechanism (Sunset provisions) in cases where they are unsure of the value of endurance for a particular policy. Notwithstanding laws that

include sunset provisions, Congress passes most laws with the intent that they serve as enduring solutions to policy problems. Such intent is consistent with the demands of a lawmaking body that has limited time and resources and therefore, an incentive to move problems off the agenda by proposing lasting solutions. While it is unclear if modern legislators should always aim to create lasting law, most Framers of our government desired that they do exactly that.

Prior to the ratification of the Constitution, delegates were not shy about expressing their alarm and disdain for the inability of state governments to provide stable, effective and just governance within their own borders. James Madison was a particularly virulent critic. Madison (1787) specifically faulted the states for the "multiplicity," "mutability," and "injustice" of their laws. The sheer number of new laws and the rapidity with which they were "repealed or superseded" was "a nuisance of the most pestilent kind" that caused confusion and instability within the states. In Federalist 62, Madison argued that a "continual change even of good measures is inconsistent with every rule of prudence and every prospect of success" for society. He claimed that the "mischievous effects of a mutable government would fill a volume" and after articulating the ills of such mutability as it applied to international relations and one's personal life, he continued by saying,

> The internal effects of a mutable policy are still more calamitous. It poisons the blessing of liberty itself. It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?

Madison was concerned with both the promulgation of many incomprehensible laws and their ephemeral nature for the prospect of liberty and the ability of citizens to plan

for the future. He expanded on this theme by suggesting a number of concrete ways in which law that they cannot rely upon negatively impacts citizens.

> In another point of view, great injury results from an unstable government. The want of confidence in the public councils damps every useful undertaking, the success and profit of which may depend on a continuance of existing arrangements. What prudent merchant will hazard his fortunes in any new branch of commerce when he knows not but that his plans may be rendered unlawful before they can be executed? What farmer or manufacturer will lay himself out for the encouragement given to any particular cultivation or establishment, when he can have no assurance that his preparatory labors and advances will not render him a victim to an inconstant government? In a word, no great improvement or laudable enterprise can go forward which requires the auspices of a steady system of national policy.

After shepherding the U.S. Constitution through the deliberation and ratification process, Madison continued to see merit in constitutional longevity. His mentor and friend, Thomas Jefferson, stood out as a notable exception to the general rule that the Founders preferred durable legal arrangements over ephemeral laws. Jefferson argued that constitutions should be rewritten every generation, declaring famously that the "Dead should not govern the living." Based on his study of actuarial tables, Jefferson surmised that "Every constitution, then, and every law, naturally expires at the end of 19 years" (Thomas Jefferson letter to James Madison, September 6, 1789). Madison and Jefferson continued to debate the virtues of durable and ephemeral law for the rest of their lives.

In recent times, Madison has been joined by allies in this concern. Some modern political scientists and members of industry argue that stability of the legal corpus allows citizens, businesses, legislators, and other actors to calculate the costs and benefits of particular courses of action and leads to continuity in governance despite shifts in governing coalitions (Patashnik 2008, Silverglate 2009, Howard 2001, 2014). When laws unravel, change or die, this undermines the stability that people need to plan for the future. Patashnik argues that there is even a sense in which a durable "bad" policy is better than a

fragile and uncertain "good" one (2008). In the realm of tax policy, one professional news organization states that "The problem for America is that no one knows what will come next in terms of changes to the tax code. With Congress constantly twiddling with the tax controls, companies and individuals are unable to develop long-term strategies to build financial security. Even a bad tax law that is left in place is better than almost constant substantive changes that undermine investment strategies and business plans" (Engineering News-Record 1992).

I make no claim that durable laws are always good, or repeals are always bad, or vice versa. Such claims are as absurd as the belief that the passage of any piece of legislation is a good, in and of itself. The purpose of this dissertation is not to enshrine durability as an absolute good, but instead to investigate the systematic determinants of it.

PREVIEW OF COMING CHAPTERS

My investigation of legislative durability is broken into six subsequent chapters. In chapter 2, I provide a brief account of the research on durability that has proceeded my own and identify the gaps in our understanding of what makes law last. Prior studies are limited in what they can tell us about legislative durability by focusing only on repeals, as opposed to the many other ways law can come to an end. Additionally, despite the fact that repeals and other nullifications of law take place at the level of individual provisions, most of these studies adopt whole laws as their unit of analysis. I improve upon these measures by proposing a new measure of legislative durability that focuses on the durability of individual provisions and accounts for all of the ways that federal law can be nullified by any of the three branches of government.

I then describe how federal law is nullified in our system of separated legislative, executive and judicial powers. Each branch regularly exercises an array of negative governing powers to negate extant law. Congress has the power to repeal legislation, deny or reduce funding for executive agencies, amend provisions out of existence or fail to renew sunset provisions. The Supreme Court may strike down unconstitutional provisions of federal law and issue writs of mandamus to stop their enforcement. The President may direct agencies to selectively enforce a law or stop enforcing a particular provision altogether. Lastly, federal agencies may unilaterally choose to stop enforcing a provision.

This chapter allows me to demonstrate how my measure of provision level durability improves upon past measures by including all of the ways provisions of federal law may be terminated. Because I measure the termination of federal provisions with regard to both repeals and omissions as recorded in the United States Code, I can capture the full range of the federal government's negative governing authority and paint a complete picture of provision level durability.

In chapter 3, I lay out the theory that motivates my claim Congress' ability to enact high quality, and therefore durable legislation, is dependent upon lawmakers' access to diverse sources of information and opportunities to engage in deliberation. In a nutshell, I argue that when lawmakers allow diverse information to inform the content of their debate and take sufficient time to deliberate the merits of a policy, the resulting law is higher quality and therefore more durable. Additionally, while access to information and opportunities for deliberation help Congress craft higher quality and therefore more durable laws, lawmakers' willingness to compromise on the contours of the resulting policy helps to protect it from attempts to dismantle it when control of Congress changes hands. To enact laws that last, lawmakers must craft policies that transcend partisan dynamics and garner support from members of both major political parties. A policy that attracts support

from both governing parties boasts a larger and more diverse cadre of supporters that can defend the new law against attempts to repeal or dismantle it.

In chapter 4, I introduce readers to my hand-collected dataset, drawn from the United States Code, which records the legal status of all 268,935 federal provisions in 21,531 laws passed between 1789 and 2012. I begin the chapter by providing a brief account of the development of the Code and describe how I use this corpus to track changes in the federal government's passage, repeal and omission of legislation throughout U.S. history. I describe how the Office of Law Revision Counsel (OLRC) records the content and timing changes to federal law and classifies and codifies its provisions into the volumes of the United States Code. I also show how a little-known procedure, positive law codification, enables Congress to periodically examine the effectiveness and desirability of extant law. When implementing this procedure, Congress frequently repeals or nullifies up to fifty percent of provisions dealing with a particular policy area. This amounts to the removal of many hundreds of pages of law from the legal corpus and is a significant, though understudied, means by which Congress has nullified large portions of federal law over the last 90 years.

In the second section of this chapter, I use the Policy Agendas Project coding scheme to construct measures of the substantive content of individual provisions of federal law. I then use these measures to visualize the durability of provisions belonging to different policy domains. The chapter culminates in a discussion of several graphs, which visualize the entire durable policy output of the federal government across time.

In chapter 5, I investigate the determinates of legislative durability over a long span of United States history. I estimate a series of logit models over three periods, historic legislative durability (1879-2012), modern legislative durability (1973-2010) and landmark legislative durability (1973-2010). In each of these periods, I account for the fact

that provisions may be nullified by repeal, omission, or a combination of the two. The combination of both repeals and omissions captures the role that all three branches play in legislative durability.

My results provide clear and compelling evidence that the most durable provisions are referred to multiple House and Senate committees and benefit from unrestricted debate. Further, they are most often contained within non-omnibus legislation, germane to the core policy content of the legislation, and enacted after Congress has gained institutional experience in the relevant policy area. Additionally, the most durable provisions are enacted during periods of unified government, higher polarization, or by polarized, divided governments. Finally, the most durable laws have the largest enacting coalitions.

In chapter 6, I apply the data I gathered on the timing of repeals to model the durability of provisions using survival analysis. The approach incorporates time as an important dimension of legal evolution and allows me to model time-varying covariates that condition whether law is repealed. My focus in this chapter shifts from what an enacting Congress can do to pass durable provisions, to how and why subsequent Congresses dismantle legislation. In particular, I examine switches in party control of the various branches of government and changes in the public's preferences for more conservative or more liberal public policies.

I find that the longer a party is in the minority in the House, the more likely they are to repeal provisions once they gain control of the House. Also, Congress responds to a more conservative public mood by increasing its repeal activity, whereas it responds to a more liberal public mood by decreasing its repeal activity. Despite this chapter's focus on the dynamics of durability over time, its models corroborate the determinates of durability, contemporaneous with enactment, identified in Chapter 5.

In chapter 7, I conclude by summarizing and restating my major findings.

Chapter 2: Nullifying Law in a System of Separated Powers

In this chapter, I provide a brief account of the research on durability that has proceeded my own and identify the gaps in our understanding of what makes law last. Prior studies are limited in what they can tell us about legislative durability by focusing only on repeals, as opposed to the many other ways law can come to an end. Additionally, despite the fact that repeals and other nullifications of law take place at the level of individual provisions, most of these studies adopt whole laws as their unit of analysis. I improve upon prior studies by proposing a new measure of legislative durability that adopts individual provisions as the unit of analysis and accounts for all of the ways that federal law can be nullified by any of the three branches of government.

The following chapter is separated into several sections. In the first, I provide a brief review of the scholarly work that has contributed to our understanding of why some laws endure and articulate the limitations of this existing literature. In the second, I justify my focus on changes to statutory law, as opposed to changes in legal precedent or common law. In the third, I draw a distinction between the actions of the federal government that alter statutory law (repeals), versus those that alter the implementation of the law, but not its underlying substance (omissions). Because I use repeals and omissions to mark the termination point for the durability of federal provisions, I provide a detailed account of the negative governing authority exercised by the Legislative, Executive and Judicial branches to repeal or omit laws of the United States in the last section.

WHAT WE KNOW ABOUT DURABILITY

Studies on legislative durability are not numerous, nor are they very old. The first scholarly papers on the topic were published less than nine years ago (Maltzman and Shipan 2008, Patashnik 2008) and the first edited volume, only four years ago (Jenkins and

Patashnik 2012). Three stand-alone articles have been published to date (Ragusa and Birkhead 2015, Ragusa 2010, Barry, Burden and Howell 2010). Scholars have pursued two parallel tracks to investigate the dynamics of legislative durability. The first is a case-study centered approach, aimed at generating testable hypotheses and exemplified by the work of Patashnik (2008, 2012) and Glazer (2012). The second is a statistical approach, aimed at testing the dynamics of durability using formal and statistical models across a greater number of cases and range of contexts, to identify the systematic characteristics of durable law. The work of Maltzman and Shipan (2008), Ragusa (2010), Ragusa and Birkhead (2015), and Barry, Burden and Howell (2010) fall into this second category, as does this dissertation.

Patashnik (2008, 2012) delved deeply into the political dynamics that govern the evolution of legislation after enactment by eschewing large-n statistical analyses, in favor of closely examining a few landmark enactments. He highlights the importance of structural implementation and political mobilization for the endurance, or lack thereof, of legislative enactments like Reagan's Tax Reform Act of 1986 and the Airline Deregulation Act of 1978, among others. He finds support for the idea that general interest reforms are most durable when they remake the institutional structure in their image by restructuring the incentives of bureaucrats, centering implementation in "cozy political subsystems" or "iron triangles," raising or lowering increasing transaction costs amongst key decision makers or relocating policymaking authority to a different committee or institution, such as the Supreme Court. He also finds support for the idea that policy feedback dynamics can generate publics that are capable of sustaining new reforms by actively lobbying Congress. Glazer (2012) also finds evidence that favorably disposed publics can uphold a policy through changes over time that might otherwise undermine it.

While Patashnik (2008, 2012) and Glazer (2012) explicitly examine the role that particular structures of entrenchment and favorable public opinion play in sustaining laws, scholars hewing to the statistical approach typically focus on the role that a law's enacting context, the ideological composition of Congress and the passage of time play in durability. For example, Maltzman and Shipan (2008) and Ragusa (2010) both show that laws face an increasing risk of repeal in the first few years immediately following enactment. In the case of what Mayhew termed landmark pieces of legislation, this period of high risk is followed by a period of monotonically declining risk of repeal (Ragusa 2010). Berry, Burden and Howell (2010) find evidence that coalitional drift and shifts in the governing coalition are predictive of Congress' willingness to repeal legislation. A sitting Congress is most likely to kill or cut programs inherited from an enacting Congress when its partisan composition differs substantially.

The advantage of systematic statistical analyses lies in their capacity to account for recurring factors that impact durability over a wide range of dynamic contexts (e.g., a sitting Congress being more likely to repeal programs inherited from an ideologically dissimilar enacting Congress). The disadvantage of such analyses is that they do not enable scholars to delve as deeply into the idiosyncratic characteristics that influence the durability of particular policies (e.g., the mobilization and subsequent revolt of elderly Medicare recipients against the self-financing mechanism of the Medicare Catastrophic Coverage Act of 1986, which lead Congress to repeal its core provisions).

Among statistical studies, an important divide has emerged in the findings regarding the effect of compromise on legislative durability. On one side, Maltzman and Shipan (2008) find evidence that laws passed by a dominant majority party, acting in accordance with the precepts of the responsible party government model, last longer, while Ragusa (2010) and Barry, Burden and Howell (2010), find that moderate policies, produced

mostly by divided governments, lead to durable enactments, which can weather shifts in governing coalitions. Although these scholars do not frame it as such, their debate can be recast along a single dimension: Does dominating the political system produce durable law or does compromise with one's political opponents produce durable law?

In their study, relying on Mayhew's list of Landmark Legislation from 1954 to 2002, Maltzman and Shipan (2008) find that unified governments produce the most durable laws. They argue that when the majority can dominate the legislative process, laws are more legally consistent, more likely to have self-executing provisions, better entrenched in the bureaucracy and contain more flexible legal enactments, all of which, reduce the need for lawmakers to revisit enacted policy.

One of the key features of American political development is the entrenchment of landmark policies in bureaucratic agencies, federal courts and within the national culture. Pierson (2004) writes that, "features of political life, both public policies and (especially) formal institutions, are change-resistant." Eskridge and Ferejohn (2010) describe how policies can become so entrenched that citizens and politicians start to view them and more importantly, treat them as eternal facets of the political landscape. For example, Social Security is a policy whose provisions have been amended, omitted and repealed, yet it has not been thrown off its developmental course, but has become deeply embedded in governing routines. Thus, Social Security's core framework will likely continue to be employed as the primary means of delivering old-age benefits well into the future.

Such policies are hard to dismantle because "those who design institutions and policies may wish to bind their successors" (Pierson 2004). Moe (1990) terms this the problem of "political uncertainty." This implies that political actors "anticipate that their political rivals may soon control the reins of government. To protect themselves, these actors, therefore, create rules that make existing arrangements hard to reverse" (Pierson

2004). McCubbins, Noll and Weingast (1987) refer to this as "deck-stacking" when coalitions empower bureaucratic agencies to make decisions that make it harder for subsequent coalitions to overturn the policy. This forms the basis for Maltzman and Shipan's (2008) assertion that the majority can dominate the legislative process by entrenching their preferences in the bureaucracy and thereby reduce the chances that their policy will be overturned.

In contrast, Ragusa (2010) argues that Congress enacts the most durable law by passing bi-partisan policies with large enacting coalitions, although his methods differ from those employed by Maltzman and Shipan (2008). Both studies use Mayhew's "landmark laws"; however, Ragusa confines his count of repeals to those that another landmark piece of legislation causes. In other words, he does not acknowledge a repeal unless a landmark piece of legislation repeals the law. Perhaps as a result of different methodological choices, Ragusa finds that landmark legislation is more likely to endure when enacted by a divided government during moderately polarized eras.

Challenges to current approaches

Because these studies were the first forays into an entirely uncharted area of inquiry, they revealed some of the determines of legislative durability, which serve both as a foundation for further inquiry and a learning opportunity for those who wish to press further. Despite their contributions, each of these studies was limited by their scope of inquiry, their selection of cases, and the unit of measurement they adopted.

Common to each of these studies is that they take into account only the incidence of policy repeal with regard to a subset of legislation (e.g., fewer than 300 pieces of landmark legislation or a few case studies). By virtue of focusing only on major policies that invite implementation in bureaucratic agencies (Patashnik 2008, 2012; Berry, Burden

and Howell 2010) or only Mayhew's "landmark pieces of legislation" (Maltzman and Shipan 2008, Ragusa 2010, Ragusa and Birkhead 2016), these studies have neglected the important role that smaller pieces of legislation play in structuring our legal corpus. A law, no matter how small, is still the law of the land and many little laws accumulate to produce a big effect.[3] Similarly, because they focus only on a severely restricted subset of landmark laws from the post-war era, these scholars were unable to observe the dynamics that govern legislative durability in earlier eras of American political development.

Despite the impact of failing to enforce law on the legal corpus, none of the preceding studies takes into account the role that the failure to enforce provisions (omissions) play in unraveling and ending legislation. This means that they are unable to account for the role of the Executive or the Supreme Court in failing to enforce, or striking down provisions of federal law. The actions of all three branches can interact to winnow extant law slowly, resulting in policy drift that changes the substantive meaning of the law. The negative governing power of all three branches are crucial components of the measure for the termination of federal law and yet only repeals have been considered in prior studies.

Furthermore, although most repeals and omissions take place at the level of individual provisions and not whole laws, none of these studies adopt provisions as their unit of analysis. An oft perpetuated misconception is that laws are repealed in whole. In fact, most are only repealed or omitted in part. Congress enacts whole laws, but repeals or omits individual provisions. Similarly, the Supreme Court strikes down individual provisions and federal agencies fail to enforce individual provisions. Rarely are whole laws nullified in one fell swoop. Although most authors recognize that statutory change after

[3] Nowhere is this more evident than in the Tax Code, which is the amalgamation of provisions from many small and large statutes.

passage takes place at the level of individual provisions, none embrace provisions as their unit of analysis.

In the next section, I attempt to remedy some of these measurement defects by describing how statutory law is shaped by our system of separated powers. Understanding statutory evolution after passage enables me to design a measure of legislative durability that accounts for the fact that nullification events take place at the level of individual provisions and that all three branches play a role in unraveling or ending legislation. By using a more comprehensive measure of legislative durability, I can tell a complete story about the causes of durability for federal law.

THE PRIMACY OF STATUTORY LAW

In this dissertation, I offer a perspective on legal change that focuses on statutory law. The United States is governed by a mix of statutory, regulatory and common law, each distinguished by the authority that promulgated it. Statutory laws are enacted by Congress, regulatory laws by executive branch agencies pursuant to a delegation of rule-making authority by Congress, and common laws are the rules and norms for action as culled from reported court decisions and precedence. Although all three branches share in making law, primary lawmaking authority resides with Congress, which enacts statutory law. Acts of Congress specify the controlling law of the land, the degree of rule-making authority delegated to agencies, and provide the material for the courts to discern Congressional intent. When Congress passes statutory law, it sets the wheels in motion for executive agencies to implement the law, and for the federal judiciary to apply and interpret it.

In rank order of legal primacy, the legislative authority vested in Congress is second only to the will of the people, manifest as the Constitution. Madison restated this principle when he wrote, "in republican government, the legislative authority necessarily

predominates" (Federalist 51). Statutes themselves set limits on the jurisdiction and procedures of executive agencies, and "in large part…. have set the terms on which judges may review the procedures and substance of executive and administrative action" (Hurst 1982, p. 17). Put another way, statutes provide the substance of what is applied and interpreted by the judiciary and provide the authority for bureaucracies to promulgate rules. Justices must have something to interpret before they set about disagreeing on how to interpret it. Federal agencies must cite statutory authority before they promulgate rules to implement policy. Both in practice and in theory, statutory authority is the principal mode of governance in the American legal system.

Despite the theoretical and demonstrated primacy of statutory law in the American political system, studies of legal change, exclusive of those that focus on repeal, overwhelmingly focus on the evolution of common law, as opposed to statutory law.

> A legal professional—practitioner, judge, or academic—tends to focus research and reasoning upon judicial decisions. Even if the issue concerns the application of a statute, usually the exposition primarily relates to the enactment as refracted through prior cases interpreting and applying it. Partly this is due to our Anglo-American legal heritage, where, prior to the twentieth century, law primarily evolved through the decisions that were the foundation and fabric of the common law (Tate 1983, p. 1).

Although our Founders borrowed aspects of the American political system from the established legal order in England, they departed from the British in their reliance on common law. They enshrined statutory law, in its place. By doing so, our Founders democratized the American legal system. Unlike common law, statutory law is evenly applied, readily published under the practice of fair notice, and more easily accessible to the average citizen. Another virtue of statutory law is that it is easier to trace the durability of statutory provisions than it is the principles, judgments, and ideas embodied in legal precedence, which is often narrowly applied to specific cases.

This dissertation departs from the bulk of prior research on legal change by focusing on the category of law that our Founders foresaw would predominate, and that modern scholars cite as the most influential for American political development (Hurst 1982, Skowronek and Glassman 2007, Johnson 2009, Eskridge and Ferejohn 2010). By investigating the durability of statutory provisions as opposed to common law principles, I am necessarily focused on nullification events that directly impact the text or broad implementation of statutory law.

REPEAL VERSUS OMISSION: SUBSTANCE VERSUS IMPLEMENTATION

There are two ways that a statutory provision can be nullified, both of which are captured in my measure of the dependent variable, provision level durability. Congress may repeal a provision, or one of the three branches may take action to stop federal bureaucracies from implementing it. There are six different ways the federal government may compel federal agencies to stop enforcing or implementing statutory law:

- Congress may cut funding for the implementation of a provision.
- Congress may amend a provision out of existence.
- Congress may include a sunset provision that stipulates a period after which a provision is no longer in force.
- The Supreme Court may rule that a provision is unconstitutional.
- The President may direct executive agencies to stop enforcing particular provisions.
- Executive agencies may unilaterally choose to stop enforcing a provision.

In each of these cases, when a federal agency no longer implements a provision of federal law, it is "omitted" from the statutory corpus. In practice, this means that the Office

of Law Revision Counsel, which tracks repeals and omissions of law, makes an editorial decision to remove the provision from the record of statutory law as expressed in the United States Code. The most important legal and practical distinction between repealed and omitted provisions is that repealed provisions are completely expunged from the statutory corpus, while omitted provisions are no longer implemented, and may not appear in the U.S. Code, but are still technically part of statutory law for the United States.

The nation's official corpus of statutory law is defined as those provisions that Congress has not formally repealed or amended and are therefore the law of the land. Because they have not been repealed, such provisions may be relied upon in interpreting or judging legal disputes. For example, omitted provisions are still admissible as evidence of federal law in a federal court, whereas repealed provisions are not. This distinction is particularly important for understanding the Supreme Court's role in legislative durability. As I discuss in a subsequent section on judicial review, the Supreme Court may issue opinions, decide legal precedence and render judgments, but it may not alter the statutory law of the United States. Statutory law is determined by the text of federal statutes, which are enacted, amended and repealed only by the United States Congress, with the signature of the President.

The only way a federal provision can truly die is through repeal. Once dead, the only way it can be resurrected is if Congress passes a new statute. By contrast, omitted provisions can be resurrected without Congressional action. They are still technically "on the books" and may be brought back to life by an industrious president, bureaucrat, legislator, or federal court. Although these "Lazarus laws," are rare, they occur with enough frequency to warrant differentiating between truly dead, repealed provisions, and only seemingly dead, omitted provisions. For this reason, the analyses in chapter 5 are often

separated by these two modes of nullification. In the next section, I give a detailed description of the national government's powers to repeal or omit statutory law.

NULLIFYING LAW IN A SYSTEM OF SEPARATED POWERS

Just as passing new laws is the result of a complex interaction between separated powers, so is nullifying old laws. The United States Federal Government is composed of three distinct branches, each vested with separate powers to accomplish a shared end, good governance. The legislative branch is empowered to enact laws, the judicial branch to interpret them, and the executive branch is tasked with their enforcement. Scholars usually describe these powers in their positive sense: the power to create, interpret, and enforce law. They are far less likely to describe these powers in their negative sense: the power to repeal, strike down, and fail to enforce law.

The federal government regularly employs a variety of measures, specific to each branch, to nullify extant law. Congress may repeal its acts or abolish federal agencies or departments. Short of abolishing, Congress may deny or reduce funding for particular agency programs, ending their enforcement. Congress may modify the substance of a provision, effectively amending it out of existence. Or it may include a sunset provision that stipulates a period after which all or part of a law is no longer in force unless Congress votes to renew it. The Supreme Court may strike down provisions as unconstitutional and issue writs of mandamus directing executive agencies to stop enforcing the offending law. The President may issue executive orders directing executive agencies to stop enforcing particular provisions, or executive agencies may unilaterally fail to enforce the law. These constituent branches of the federal government regularly exercise the full range of these negative powers to negate extant law and revert policy to a prior status quo point.

Understanding the negative governing power of each branch is fundamental to understanding how and why law ends.

Repeal

Repeal is the act of revoking and annulling a legal provision, law or congressional act. Only the United States Congress may repeal federal laws. Congress' power to repeal its acts is rooted in its constitutionally conferred power to make law. Article 1, Section 1, Clause 1, also known as the Vesting Clause, vests all federal legislative power in Congress. Sections 7, 8, and 9 prescribe the legislative process, empower Congress to make law in discrete policy domains, and place limits on Congress' legislative powers. Together, these clauses establish Congress' power to make federal law. They also empower Congress to unmake law.

The power to unmake law is implicit in Congress' positive legislative authority. Such power is vital in a mature republic, where many laws accrete over time, and effective governance may require that a current legislature revises what a past legislature has done. A government that could enact only new laws, without reference to, or revision of, what came before, would be hamstrung in its ability to govern.

The negative power of repeal has long been recognized as important to Western legal traditions. The English Crown repealed clauses of the original 1215 Magna Carta to create the definitive 1225 version. The English parliament has continued repealing the Magna Carta's clauses, leaving just four of the original 63 clauses in force today (Moseley 2014). In his Commentaries on the Laws of England, Sir William Blackstone wrote, concerning the process of repeal, that extant law was rightly subject "to such alterations and provisions as the legislature shall from time to time make concerning the same" (1765). Later, during the debates surrounding the ratification of the U.S. Constitution, John Jay

affirmed that "they who make laws, without a doubt, may amend or repeal them" (Federalist 64). He and his contemporaries understood repeal as part of the "ordinary legislative power" (Federalist 84).

That the American Founders understood the importance of revising past political commitments is perhaps nowhere more evident than in the procedures they outlined for amending the Constitution. While many hoped that its general framework would endure, the Founders understood the importance of providing a remedy for revising our governing structure. Article 5 describes a two-step process whereby the nation's frame of government may be altered. First, it enables a two-thirds majority in Congress or a two-thirds majority of States' legislatures to call for a constitutional amendment. Second, an amendment that is ratified by the legislatures of three-fourths of the states or State ratifying conventions in three-fourths of the states becomes part of the Constitution. Since 1789, the states have ratified 27 amendments, some of which have replaced language in the original constitution. For example, the 17th amendment supersedes Article 1, Section 3, Clauses 1 and 2 of the Constitution by providing for the direct election of Senators by the people of the States, rather than the election of Senators by State legislatures. The passage of the 17th Amendment functioned as a repeal and replacement of the original language of Constitution.

Today, repeals are the most common way federal law comes to an end. Since 1789, Congress has repealed fourteen percent of all federal law, while six percent has been omitted by other means. The procedure for repealing federal law is straightforward. Congress must pass a new law to repeal an old one. Within the text of the new law, Congress must specify which provisions are to be struck from the federal corpus. The new law must clearly specify the exact provisions and order their eradication using the words

"repeal," repealed," strike," or "strike and insert" (OLRC 2014). I refer to any law that has repealed an old provision as a "repealing law."

Repealing laws can be targeted texts that call for the repeal of a single provision, or they can be landmark enactments that reform an entire policy area through the repeal, and sometimes replacement, of many provisions at once. In either case, a formal repeal requires that Congress vote specifically to remove a portion of law, thereby nullifying it from the moment of the repealing law's enactment. The practical effect of a repeal is that the provision is formally rescinded and therefore no longer carries the force of law. It is no longer statutory law of the United States and therefore, citizens are no longer required to follow its precepts.

The following sections describe the ways in which Congress, the Supreme Court, and the Executive omit federal law. Although omitted law does not have the same finality associated with repealed law, in practice, it nonetheless impacts the durability of federal provisions.

The Power of the Purse

Congress' "power of the purse," emanates from Article I, Section 8, Clause 1 of the Constitution, known as the Taxing and Spending Clause, and Article I, Section 9, Clause 7, known as the Appropriations Clause. These clauses work together to ensure Congress, alone, is endowed with the ability to tax and spend public money for the national government. This gives Congress incredible bargaining power in conflicts with the Executive because it can cut funding for federal programs or agencies, effectively ending or dismantling them (Kiewiet and McCubbins 1991, Wildavsky 2006).

If Congress cuts funding for an agency, the provisions they were tasked with implementing are no longer enforced. If Congress cuts funding for a particular program,

the provisions underlying that program are no longer enforced. In either case, the provisions are still technically "on the books" and are therefore still part of the statutory law of the United States, although they have ceased to function as the law of the land because they are no longer implemented. If an agency fails to enforce a provision of federal law for a long enough period, other agencies, Congress, and eventually the Office of Law Revision Counsel treat it as omitted (OLRC 2014).

Amendment

In addition to repealing a law or cutting funding for its implementation, Congress may amend statutory law. The power to amend law, like the power to repeal law, is rooted in Congress' constitutionally conferred power to make law. Sometimes, in the course of revising extant law, Congress will substantively amend a provision until it has lost its original meaning. In these cases, the original provision no longer matches its amended version in construction or purpose. The Office of Law Revision Council refers to this as being "amended out of existence" (OLRC 2014). While the original provision was never formally repealed, just like provisions that go unenforced due to lack of funding, they no longer effectively serve as the law of the land and are thus treated as omitted from the legal corpus.

Sunset Provisions

The final way Congress omits federal law is by inserting sunset provisions into legislation. Sunset provisions stipulate a period after which all or part of a law is no longer in force unless Congress votes to renew it (Adler and Wilkerson 2010). Congress may write a sunset provision requiring that a law is automatically repealed after a specified period, or that a law is merely no longer in force after a specified period. In the latter case, when a law has expired, but Congress has not repealed it, it is treated as omitted law.

By design, Congress periodically reexamines laws that include sunset provisions, giving lawmakers an opportunity to repeal, rewrite or withdraw funding for particular provisions to increase the efficiency and effectiveness of public policy. They can use this mechanism in cases where they are unsure of the value of endurance for a particular policy or when they are unable to foresee its consequences. Having already discussed the virtues of durable versus flexible law in the last chapter, I do not repeat the debate here. It is, however, worth noting that Congress' use of sunset provisions as a way to revisit past law has substantially increased over the last few decades. This is likely because, as the issues Congress addresses have become more complex, lawmakers have a greater incentive to treat statutes as temporary in nature, until they can identify enduring solutions.[4]

Two early examples of Congress omitting controversial laws by allowing them to expire at their sunset dates are the Sedition and Alien Friends Acts of 1798. In the years immediately following the French Revolution, President Adams and other members of the Federalist party feared that their opposition, particularly Democratic-Republicans, might foment violent revolution against the federal government. In an attempt to guard against this perceived threat of anarchy, Congress passed, and the President signed four acts that criminalized real or perceived threats against the government.

Of the four, two included sunset provisions, the Sedition Act (1 Stat. 596) and the Alien Friends Act (1 Stat. 577). The Sedition Act criminalized making false statements that were critical of the federal government, while the Alien Friends Act allowed the president to imprison and deport non-citizens who his administration deemed dangerous. These acts were allowed to expire and were therefore omitted from the legal corpus in 1800 and 1801, respectively. Had they not expired, they would have afforded the federal government

[4] In the 101st (1989-1990) and 102nd (1991-1992) Congresses, Cox finds that issue "complexity" was a significant predictor of the presence of a sunset provision (Cox 1994).

unambiguous power to imprison citizens who are critical of the government and non-citizens who are deemed dangerous.

In consonance with the overall thesis of this dissertation, durable laws, even very old ones, can have a massive impact on the political options available to decision makers. Another of the Alien and Sedition Acts, the Alien Enemies Act (1 Stat. 570), did not include a sunset provision. The act empowered the president to imprison and deport any male citizen of a hostile nation over the age of fourteen during times of war. Not only did Congress not include a sunset provision in this act, but it also hasn't repealed or omitted it by any other means in the last 218 years. It is still the unambiguous law of the land. Because it endured beyond Adam's presidency, it was available to provide the legal justification for President Roosevelt's order to intern Japanese and German Americans during World War II. Most recently, it was invoked by a former Regan administration aide to justify the legality of presidential candidate Donald Trump's proposal to ban the immigration of Muslims into the United States (Wemple 2015).

Judicial Review

The Supreme Court is the only branch of the federal government that is commonly understood in terms of its negative governing power, that is, its power to strike down provisions of federal law. Hamilton first hints at the power of judicial review when he describes a Federal Judiciary, "whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void." He expounds on the Federalists' plan that,

> [T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between

> the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents (Federalist 78).

The Supreme Court first claimed the power of judicial review in its landmark 1803 decision, Marbury v. Madison, 5 U.S. 137. Drawing on authority granted to them by Article III, Section 2, Clauses 1 and 2 of the Constitution, also called the "Case and Controversy Clause," the majority opinion claimed that "it is emphatically the province and duty of the judicial department to say what the law is" (Marbury v. Madison, 5 U.S. 137). In truth, the Supreme Court does not wield as exhaustive a power over federal law as this statement suggests.

The Supreme Court may issue opinions, decide legal precedence and render judgments, but it may not alter the statutory law of the United States. The Court's decisions establish a binding precedent for lower courts, forming the backbone of common law, but do not alter the text of federal statutes. The Court's power is further muted because it relies on executive agencies to implement its decisions and on Congress to fund that implementation. "The Court has neither the power of the sword nor the power of the purse" (Federalist 78). As a result, Congress may choose to ignore the Court's holding and withhold resources to fund and implement its decisions.

In theory, the Supreme Court translates the will of the people, as manifest in the Constitution, into decisions that hold acts of Congress as constitutional or unconstitutional, thereby having the final say on the law of the land. In practice, Congress can respond to the Court after it has held that a provision is unconstitutional, in one of five different ways. Congress may choose to render no response, repeal the original provision, repeal the original provision and pass a new piece of legislation to replace it, amend the original

provision to address the constitutional issue at hand, or amend the Constitution to constitutionally validate the original provision (Pickerill 2004).

In his survey of Supreme Court decisions between 1953 and 1997, Mitchell Pickerill identified seventy-one Court decisions in which seventy-four federal provisions were struck down. Of these, Congress acted to save unconstitutional statutes 38 percent of the time by either repealing and replacing the provision, amending the provision or amending the Constitution. In 14 percent of the cases, Congress showed complete deference to the Court by repealing and thus abandoning the statute. This means that in 62 percent of cases, Congress responded to the Court by changing statutory law either through formal repeal or amendment. In 38 percent of the cases, Congress did nothing at all (2004).

In cases where Congress did not respond to the Court's decision, the provision is still part of the statutory law of the United States. If executive agencies comply with the Court's directive to stop enforcing the provision for long enough, the provision may eventually be treated as omitted law. Until that time, it continues to function as federal law. Some examples of provisions of federal law that are still technically part of the statutory law of the United States, but have been struck down as unconstitutional by the Supreme Court, include the Defense of Marriage Act (DOMA, Pub. L. 104-199) and a substantively important residual clause of the Armed Career Criminal Act (ACCA, Pub. L. 98-473).

In the case of DOMA, its first provision, defining marriage between a man and a woman, includes a reference in its section of the United States Code that explains that it is contested law (1 U.S.C. 7). Its second provision, releasing States, Territories and Indian Tribes from any legal obligation to recognize same-sex marriages performed in other localities, does not include a clarifying note and appears to be the uncontested and unambiguous statutory law of the United States, despite being struck down by the Supreme Court (28 U.S.C. 1738C).

In the case of the ACCA (18 U.S.C. 924(e)), it requires a minimum 15-year prison sentence for recidivists convicted of unlawful possession of a firearm, who have had three prior state or federal convictions for violent felonies or serious drug offenses. This policy is more commonly known as the "three strikes rule." In *Johnson v. United States* (2015), the Supreme Court held that the residual provision defining "violent felony," was unconstitutionally vague and in violation of due process. Despite being struck down by the Supreme Court, the provision is still part of statutory law, with no reference to the contested nature of its constitutionality in the United States Code.

Beyond passive, non-response, Congress may choose to flagrantly flout the Supreme Court and resurrect "unconstitutional" provisions. One well-known example involves *INS v. Chadha* (1983) and the legislative veto.

> In that case, the Court invalidated portions of the Immigration and Nationality Act that granted to Congress a one-house legislative veto over decisions by the Immigration and Naturalization Service (INS) regarding the deportation of aliens. The Court held that the legislative veto violated the separation of powers provision, specifically the constitutional requirements of bicameralism and presentment of all laws to the president (Pickerill 2004, p.).

As Louis Fisher and others have shown, Congress ignored the Court's holding and continues to use legislative vetoes (Fisher 1990, 1993). In the years since *INS v. Chadha* (1983), it has even increased it use of these vetoes by applying them to policy domains beyond immigration and naturalization (Pickerill 2004). The judicial branch has few options available to it to compel Congress to follow its orders.

As a tactic of last resort, the Supreme Court may order a writ of mandamus directing federal agencies to cease enforcing a provision of federal law. However, even a writ of mandamus may not forcibly compel Congress to repeal its acts. Thus, the Supreme Court's role in legislative durability is a complicated one. Its decisions, on their own, do not alter

statutory law, yet if Congress and the Executive cooperate, the Supreme Court can radically alter the interpretation and implementation of the law. It has a proven track record of convincing Congress to repeal or otherwise alter an offending law roughly 62 percent of the time. The other 38 percent of the time, Congress may choose to ignore the Supreme Court. When it does, the contested provision may eventually be treated as omitted law or Congress may choose to resurrect it, continue to enforce it, and hope to delay a constitutional challenge to it. As it pertains to the durability of federal provisions, it appears that Congress, not the Supreme Court, often has the final say on the law of the land.

To put the Supreme Court's role in legislative durability in perspective, of the 37,790 provisions that have been repealed, and 14,862 provisions that have been omitted from federal law since 1789, fewer than 200 are no longer enforced due to a Supreme Court judgment. The vast majority of ephemeral provisions are omitted for reasons having nothing to do with the Supreme Court's power of judicial review. In particular, the Executive has played a much larger role in the durability of federal provisions, as measured by omissions to statutory law, than has the Federal Judiciary.

Executive Non-Enforcement

The President is vested with executive power by Article II, Section 1, Clause 1 of the Constitution. A further clause, Article II, Section 3, Clause 5, requires that the President "take care that the laws be faithfully executed." Despite a Constitutional duty to faithfully execute the law, many Presidents exercise their executive power by failing to implement or enforce the law. This failure can take the form of an executive order, directing federal agencies to stop implementing the law (Howell 2015), or a signing statement, identifying a provision that the President believes unconstitutional and should, therefore, be treated as null.

Presidents' inclination to fail to enforce the law crosses time and party lines. Before it expired, President Jefferson declined to enforce the Sedition Act (1 Stat. 596) because he believed it was unconstitutional (Jefferson 1801a). In 1975, the Supreme Court rebuked President Nixon for failing to spend all of the federal funds that had been appropriated to implement the Federal Water Pollution Control Act Amendments of 1972 (*Train v. City of New York*, 420 U.S. 35). In the reverse of *Train v. City of New York*, a Federal judge recently ruled that the Obama administration could not spend money that had not been appropriated to it by Congress to implement provisions of the Patient Protection and Affordable Care Act (Pub. L. 111-148, *United States House of Representatives v. Burwell*). President Clinton failed to enforce certain gun-control regulations (Americans for Gun Safety 2003), while President Bush failed to enforce certain environment regulations (Solomon and Eilperin 2007).

Most recently, President Obama delayed the implementation of the employer mandate of the PPACA (Eilperin and Goldstein 2014) and issued "12 executive orders directing various agencies in the Departments of State, Justice and Homeland Security to refrain from deporting some four million adult immigrants illegally present in the United States if they are the parents of children born here or legally present here and if they hold a job, obtain a high-school diploma or its equivalent, pay taxes and stay out of prison" (Napolitano 2016). For the purpose of studying legislative durability, the legal status of statutory law is thrown into question when the executive no longer enforces it.

Like many other modes of nullification, if executive agencies fail to enforce a provision of federal law for a long enough period after the President issues an executive order or signing statement, the Office of Law Revision Counsel treats it as omitted (OLRC 2014). It is important to remember that the executive branch is a massive compilation of many different agencies, department heads and other actors to whom Congress often

delegates some measure of discretion. It isn't necessary that the President issue an executive order or signing statement for a provision to go unenforced. Sometimes provisions are omitted because federal agencies make a unilateral choice to stop implementing the law.

Provisions are occasionally omitted from the federal corpus when agencies claim they have become unenforceable. This may occur when the passage of time or technological advancement has rendered provisions obsolete. For example, provisions dealing with travel by horse and carriage in the District of Columbia are still technically on the books although they are no longer enforced. Modern Washington, D.C. no longer has carriage tracks and therefore little reason to regulate the size of carriages, nor the conduct of their drivers or the horses pulling them. Similar provisions, dealing with the provision of a carriage for the President (3 U.S.C. § 108) or House members' mail (2 U.S.C. § 99) were formally repealed and therefore have a record of which law repealed them. The more general D.C. regulations were never repealed; they were simply no longer enforced.

Other notable examples of omission of law due to non-enforcement, are those provisions that apply to the former territories of the United States. Provisions governing the territories of Hawaii and Alaska were omitted when Hawaii and Alaska were admitted to the Union (48 U.S.C. § 2-488(f); 48 U.S.C. § 491-724). Technically, laws governing these territories are still statutory law, but because agencies no longer treat them as carrying the force of law, they've been omitted from the statutory corpus. It is difficult to enforce a law calling for the registration of all vessels owned by citizens of the territory of Hawaii, when no such territory exists (48 U.S.C. § 509).

Repeals, Omissions, and Measuring Durability

Despite differences in the processes that generate repeals and omissions of law and the legal finality of each, average citizens are unlikely to notice any practical differences between the two. A federal agency may stop implementing a provision because it was repealed, unfunded, expired, substantively amended, struck down as unconstitutional, or because the agency was directed to or choose to stop implementing it. The practical result for the average citizen is the same. The provision is no longer enforced. Unenforced provisions become invisible to all but the most observant politicians, legal practitioners, and scholars. As the keeper of the United States Code, Office of Law Revision Council regularly consults with Federal agencies to discover which provisions are no longer being enforced. By regularly consulting with the executive branch, the OLRC can render an accurate picture of which provisions are being treated as omitted from statutory law (OLRC 2014). For this reason, I rely on the volumes of the United States Code to collect data on provision level durability and measure the termination of federal provisions with regard to both repeals and omissions.

Beyond the differences between repeal and the various omissions I have described above, there are other notable dissimilarities that affect how each can be investigated, empirically. Because repeals require that Congress enact a repealing law, it is possible to specify the exact moment that Congress repeals a provision from the legal corpus. The repealing law's enactment date and time mark that moment. Because omissions of law take varied forms, some of which do not require the enactment of new legislation, the timing for these events is far more difficult to track reliably. For example, a provision may have effectively stopped being enforced in the late nineteenth century and yet not be recognized as omitted until much later. Despite the difficulties in tracking the timing of omissions of law, explored in greater detail in Chapter 4, they constitute a common means by which law

comes to an end. The enactment of laws, the repeal of laws, and their omission from the federal corpus all affect the legal structure that citizens rely upon to gauge the legality of their actions and to plan their futures.

Because I measure the termination of federal provisions with regard to both repeals and omissions as recorded in the United States Code, I am able to capture the full range of the federal government's negative governing authority and paint a complete picture of provision level durability. If I were to measure durability with reference to only repealed provisions, as do all prior studies, I would miss many of the ways in which the federal government stops enforcing a provision of federal law, in practice. Because I include repeals and omissions of law, I can investigate the role that all three branches play in the durability of federal law.

In this chapter, I have discussed the nuts and bolts of statutory law, shown how my measure of provision level durability improves upon past measures and touted the virtues of a dependent variable that measures the termination of federal provisions with regard to both repeals and omissions. Whereas this chapter has focused on a discussion of the measurement of durability, the following chapter will focus on the theoretical determinates of durability. In it, I seek to build on and extend prior theoretical work by proposing a theory of legislative durability that can predict the durability of provisions from both landmark and non-landmark laws, over a long period of U.S. history. The core precept of my theory is that lawmakers who actively seek out diverse sources of information, engage in deliberation, and reach a substantive compromise, pass the most durable law.

Chapter 3: Information, Deliberation, and Compromise

The question motivating this dissertation is "What makes law last?" I argue that when legislators seek out diverse sources of information, engage in deliberation, and reach a substantive compromise, they pass the most durable law. My goals in this chapter are to justify this assertion and to derive testable hypotheses from the theory that underlies it. Pursuant to this goal, this chapter progresses from a general discussion of the roles of information, deliberation, and compromise in forming durable law, to a discussion of the specific features of the legislative process that increase legislators' access to diverse sources of information, encourage deliberation and enable compromise. Conversely, I discuss those features of the legislative process that decrease legislators' access to information, discourage deliberation and serve as impediments to the realization of a substantive compromise. Immediately following my discussion of each feature, I clearly articulate my theoretical expectations for its effect on legislative durability in the form of numbered hypotheses.

INFORMATION, DELIBERATION, AND COMPROMISE

When I began this project, I originally intended to investigate the systematic features of the legislative process that enable Congress to craft high-quality legislation. By "high quality" I mean laws that are clearly stated, synergistic with existing law, and successful in achieving their objectives with a minimum of unintended and undesirable consequences. In other words, high-quality laws should, at a minimum, solve the problem for which they were intended without creating additional problems for the government to solve. To identify laws that fit this description, I considered a composite measure that took into account the clarity of a law's text, its fit with the existing legal corpus, and its efficacy, as measured by program evaluation studies. I quickly discovered that such a task was

untenable given the breadth of legislative history I hoped to cover. While it was untenable for me to measure the quality of tens of thousands of laws over the course of U.S. history, it was possible to measure the durability of those laws. By virtue of the extensive records collected by the Office of Law Revision Counsel, I could use the United States Code to identify the durability of every provision of federal law enacted since the American founding. My focus shifted from what Congress could do to enact high quality law, to what it could do to enact durable law.

Although I abandoned my early attempts to measure the quality of legislation, I nonetheless retained my insights into what Congress could do to enact high-quality laws and applied them to my study of legislative durability. The relationship between the quality of legislation and its durability hinges on the ability of a law to solve a problem over time. Quality law will endure because it solves a problem, in the long-term, without creating new ones and therefore needs fewer future revisions, making it more durable. Given that the quality of law can be a cause of its durability, the same factors that result in high-quality legislation consequently produce durable legislation.

Quality law and durable law, are related, though not mutually exclusive concepts. Quality law endures, but not all law that endures is high quality. Law may endure because it becomes entrenched in the federal bureaucracy and is, therefore, difficult to uproot (Maltzman and Shipan 2008, Patashnik 2008), because it precipitates the formation of issue groups that sustain a policy, despite its ineffectiveness, (Campbell 2004, Patashnik 2008), or because Congress is unable to muster the votes to repeal it. Notwithstanding Speaker Boehner's claim that Congress "ought to be judged on how many laws we repeal" (Cillizza and Blake 2013), most legislators find it easier to claim credit for what they enact, rather than what they repeal. Although bureaucratic entrenchment, active interest groups and a

lack of votes for repeal may contribute to a law's endurance, a law may also simply endure because it solves the problem for which it was intended.

Congress' ability to enact high quality, and therefore durable legislation, is dependent upon lawmakers' access to diverse sources of information and opportunities to engage in deliberation. Information is the data and knowledge that informs policymakers on the state of the world, the effectiveness of past policies, and the possible solutions that exist for pressing problems. The more information a lawmaker has, the better he or she can justify and choose among competing solutions and programs (Baumgartner and Jones 2015). Deliberation is a dialectic enterprise in which ideas and information are exchanged, considered, and form the basis for collective action (Bessette 1994). The more lawmakers deliberate on the dimensions of a problem and its proposed solutions, the better they can choose or craft an effective solution. When lawmakers allow information to inform the content of their debate and take sufficient time to deliberate the merits of a policy, the resulting law is of higher quality and therefore more durable.

While access to information and opportunities for deliberation help Congress craft higher quality and therefore more durable laws, lawmakers' willingness to compromise on the contours of the resulting policy helps to protect it from attempts to dismantle it when control of Congress changes hands. We know a sitting Congress is most likely to kill or cut programs from an enacting Congress when its partisan composition differs substantially (Maltzman and Shipan 2008; Berry et al. 2010). We also know that a newly empowered majority party is more likely to repeal provisions after a long stretch in the minority (Ragusa and Birkhead 2015). To enact laws that last, lawmakers must craft policies that transcend these partisan dynamics and garner support from members of both major political parties. A policy that attracts support from both governing parties boasts a larger and more diverse cadre of supporters that can defend the new law against attempts to repeal or

dismantle it, post-enactment (Ragusa 2010). The most transparent and direct way to form a bipartisan law is through compromise.

A compromise is an agreement born of reasoning on the merits of public policy, in which all sides sacrifice something to improve the status quo from their perspective, and these sacrifices are at least partly determined by the other sides will (Gutmann and Thompson 2013). Further, a substantive compromise requires that each side's sacrifice take the form of a shift in their preferred policy position in legislation. By coming to a sincere agreement on the substance of policy, the resulting legislation attracts support from both parties, thus inoculating the law against the partisan dynamics that may otherwise undermine it. Taken together, increased information, deliberation, and a substantive compromise conspire to create policy that is more effective, more widely supported and therefore more durable.

Law that is more effective and more widely supported is less likely to be dismantled by any of the three branches of government. Law that is carefully crafted and therefore continues to solve the problem for which it was intended is less likely to be repealed or have its funding revoked by Congress. Similarly, executive agencies have little incentive to stop implementing law if it is working. Additionally, carefully crafted policies are less likely to generate unintended consequences, such as a constitutional challenge, that could bring a provision to the Supreme Court's attention. Finally, law that represents a substantive compromise between the major political parties is less likely to be targeted for nullification by partisan presidents, legislators, bureaucrats or litigants. All three branches have less incentive to dismantle a policy that enjoys bipartisan support.

The remainder of this chapter is broken into two overarching sections. In the first, I describe how information and deliberation enable Congress to pass high-quality laws and discuss my theoretical expectations for the impact of committee referrals, truncated debate,

and the intrusion of new and established issues onto the legislative agenda, on the durability of federal law. In the second section, I describe how a substantive compromise enables Congress to pass law that can weather shifts in party control of the government and partisan attempts to dismantle it. Within this section, I discuss my theoretical expectations for the impact of logrolling, omnibus legislation, non-germane provisions, the size and composition of enacting majorities, restrictive rules, conditions of unified or divided government, and polarized parties, on the durability of federal law.

INFORMATION AND DELIBERATION

The United States Congress was designed to process information and solve problems. Congress is constantly awash in information from constituents, bureaucrats, lobbyists, think tanks, partisans, academics, private citizens, and members of industry and business, all eager to alert lawmakers to problems and urge them to enact particular solutions (Kingdon 1984, Jones and Baumgartner 2005, Baumgartner and Jones 2015). To pass durable law, Congress must gather information from these diverse sources into venues for deliberation, prioritize that information and apply it to far-sighted legislative solutions.

Informational diversity stems from differences in individuals' knowledge and experience related backgrounds. It is a well-established finding across multiple scientific domains that informational diversity helps individuals solve problems, more creatively and more effectively (Philips 2014). People with different experiences bring diverse information, ideas, and perspectives. A bureaucrat who implements the law will provide different information concerning the effectiveness of a proposed policy than will a member of industry, who is responsible for following the law. Likewise, private citizens may provide information regarding the impact a proposed policy will have on their individual

livelihood, whereas an academic may provide information that highlights the aggregate effect of a proposed policy on large segments of the population. A conservative may emphasize the impact of a proposed policy on individual liberty, while a liberal may provide information concerning its impact on equality. A House member may highlight the impact of a policy on local interests, while a Senator may highlight the same for a broader geographic region. A member of the current administration may highlight a different impact of a policy. Baumgartner and Jones call the search for a wider range of information from more diverse sources, entropic search. "As social problems are complex, a wider range of information provides a better context for decision-making than a narrowly focused discussion" (Baumgartner and Jones 2015).

By engaging in an entropic search, lawmakers become better informed on the potential consequences of a proposed policy from multiple perspectives. This enables them to be more far-sighted in their design of policy, leading to an effective law with fewer unintended consequences, which is consequently, more durable. To gather and process information from diverse sources, legislators require two resources, venues in which to discover, prioritize and process information, and time to engage in these activities. As I discuss in subsequent sections, committees serve as Congress' foremost venue for gathering and prioritizing complex information. Additionally, some congressional procedures expand the time available for legislators to debate the merits of public policy, while others limit these opportunities. In addition to enabling legislators to absorb information, appropriate venues and sufficient time enable lawmakers to deliberate on public policy after they have collected information.

At some point, legislators must stop collecting information and begin making collective decisions (Baumgartner and Jones 2015). Put another way; legislators must move from gathering information to debating the merits of proposed policies, crafting

solutions, and voting on measures. Deliberation consists in the exchange of ideas and information before collective action (Bessette 1994). Deliberation in the United States Congress is characterized by three features that lead to the enactment of higher quality legislation.

First, deliberation requires an openness on the part of lawmakers to new information. It "requires individual participants to be at least somewhat open to facts, hypotheses and other viewpoints about the nature of the problem, possible solutions, and the scope and content of proposed norms" even if that information contradicts their preconceived ideas (Eskridge and Ferejohn 2010, p. 15). Eskridge and Ferejohn refer to this as the dialogic feature of republican deliberation (2010). Just as dialogic literature is in communication with multiple written works, dialogic deliberation requires lawmakers to recognize the value of information from multiple sources that may contradict their preconceived notions, but nonetheless ought to be considered to design durable law.

Second, deliberation relies on the inclusion and serious consideration of the diverse interests that characterize a decision-making body. The United States Congress has a large and heterogeneous membership. Representatives and Senators vary in the constituencies they represent and their individual ideological preferences. The American Founders viewed these diverse constituencies and preferences as positive attributes of the lawmaking process. Congress itself was designed to maximize the inclusion of diverse preferences by "establishing different houses of legislation to introduce the influence of different interests or different principles" (Jefferson 1785) and by diffusing representation across large geographic regions and demographic populations.

As a result of these institutional designs, lawmakers represent a variety of provincial, industrial, demographic, and regional interests. These different segments of the population often bear the costs and benefits of public policies disproportionately. Because

of this, leaders in Congress would be wise to include lawmakers who represent varied constituencies in the debate of policies that affect these groups. A failure to take into account the diversity of interests, perspectives, and ideas representing a diverse population, can lead to policies that place an unequal and unwelcome burden on particular segments of society. This unequal burden may cause a backlash among disaffected groups. A good example was the geriatric backlash that followed the passage of the Medicare Catastrophic Coverage Act in 1988. Congress repealed most of its provisions after the elderly discovered they would bear most of the cost of the reform (Moon 2006). Lawmakers may avoid the backlash that follows asymmetrical costs and benefits by including lawmakers who represent diverse segments of society in the debate of public policy. By being inclusive in debate and deliberation, Congress can aggregate diverse and sometimes contradictory perspectives into legislative solutions that represent the will of the majority, while recognizing and protecting the interests of political minorities.

In addition to representing different interests, lawmakers ascribe to different belief systems that add further diversity to the perspectives in Congress. At a minimum, the political belief systems of elites in Congress, which political scientists call ideologies, act as “a yardstick against which political objects and their shifting political significance over time [are] evaluated" (Converse 1964, p. 216). Ideologies may prescribe normative visions for good government, but they may also be important sources of information. Information concerning the possible effects of particular courses of action and theories about the long-term consequences of particular policies. By deliberating on issues of public importance with colleagues who hold different political beliefs, lawmakers gain access not only to different perspectives, but also diverse information about the possible consequences of laws. By seriously considering the ideological and factual content of their opponents’

arguments legislators become better informed and better able to identify the shared ground for a potential compromise.

The third and last characteristic of effective deliberation in the U.S. Congress is that it must be purposeful. That is, aimed at solving problems, preferably for the long term. The primary goal of deliberation is to arrive at a decision that prescribes a particular character of collective action or inaction to remedy a problem. In accordance with this goal, deliberation should be farsighted, both on the particulars of a policy and its effect on the wider political system. Spending time and energy deliberating on solutions that offer only temporary remedies for pressing problems is a poor expenditure of Congress' resources. This tactic is akin to playing a protracted game of whack-a-mole, where the same problem may unexpectedly resurface at an inopportune time. While short-term solutions may well be necessary in times of crisis, it is in Congress' interests to deliberate on enduring solutions to policy problems.[5] Such intent is consistent with the demands of a deliberative body that has limited attention and resources and therefore, an incentive to move problems off the agenda by proposing lasting solutions.

The sum of my argument thus far is that when lawmakers draw on diverse sources of information, deliberate with colleagues who represent varied constituencies and ideologies and attempt to solve problems in the long-term, they enact higher quality and therefore more durable public policies. In the next section, I discuss specific features of the legislative process that give Congress venues to gather information and deliberate, and sufficient time to engage in these activities. I also discuss how Congress' experience in

[5] Legislative durability is measured in this dissertation only with regard to those laws that Congress ostensibly intends to endure, as evidenced by their inclusion in the United State Code. The Office of Law Revision Counsel only codifies those provisions of law that legislators intend be part of the general and permanent law of the United States. As such, temporary measures, typically those whose tenure does not exceed 5 years (OLRC 2014) are not included in the Code.

particular policy domains affect lawmakers' access to information and need for deliberation.

The Role of Venue and Time

Legislative processes that expand lawmakers' access to information and opportunities for meaningful deliberation help Congress to craft durable law, whereas processes that limit lawmakers' access to information and opportunities for meaningful deliberation results in ephemeral law. In the following sections, I discuss the role of congressional committees and truncated debate periods in Congress' ability to craft enduring law.

Committee Referrals

Committees play an integral role in Congress' capacity to solve problems and craft legislation (Wilson 1885, Fenno 1973, Shepsle 1978, Krehbiel 1992). After observing the Congress of the late 1800s, Woodrow Wilson declared that "Congress in its committee rooms is Congress at work" (Wilson 1885). For the purpose of legislative durability, the most salient characteristic of committees is that they are the nexuses for information processing and deliberation in the modern Congress. "While there are other avenues of access for information and ideas to enter the legislative process, including especially the General Accounting Office, the Congressional Budget Office, and the Congressional Research Service and the staffs of individual members, committees remain the major institution for bringing information to bear on lawmaking matters" (Baumgartner and Jones 2015). Committees are the primary venue in which lawmakers gather information, deliberate on the merits of public policies, and craft laws. Lawmakers craft more durable legislation when they take advantage of committees' policy expertise and ability to gather information by referring bills to multiple committees.

Like all governments, the U.S. government seeks to "control and funnel information by setting out rules and procedures to prioritize" the massive flow of incoming information (Baumgartner and Jones 2015). One of the ways it does this is by channeling new information through congressional committees. The primary way committees gather and funnel information into government is by holding hearings and inviting witnesses to testify before committees. Witnesses come from many backgrounds, most commonly being leaders in business, bureaucrats, and interest groups (Surface Shafran 2016). They may also be members of the current administration, the public, or academics. Witnesses' testimony provides legislators with information on the substance of a potential policy, its feasibility, and likely effects. The diversity of information in testimony varies by the diversity of the backgrounds and experiences of witnesses. The more witnesses a committee calls, the more information legislators may gain.

Not only are committees the primary venue through which Congress draws in new information to inform policy debates, they are also repositories of expert information in their respective policy domains. Committee staff are significant sources of institutional information regarding the success or failure of past policies. Although members of Congress are elected at regular intervals, committee staff often work for the same committee for many years, building up policy expertise in domains the committee regularly oversees. This existing store of expertise is an invaluable resource for lawmakers hoping to learn from past mistakes. In addition to committee staff, Representatives, Senators, and their staffs, develop policy expertise by serving on particular committees. Committee members are encouraged to become specialists and experts in their respective issue domains (Hedlund 1984, Adler and Wilkerson 2012). As a result of this specialization, each committee functions as a venue for deliberating on the area it oversees.

Although committees specialize in particular policy areas, we know that virtually all public policies are inherently multidimensional (Jones 1994). That is, although they may have a dominant dimension through which we commonly understand their importance and impact, policies invariably affect issue domains outside of this dominant dimension. For example, gun control may be understood as a public health issue, a constitutional rights issue, a sporting issue, or a crime control issue. Partly as a result of the multidimensionality of issues, committees have overlapping jurisdictional boundaries that obfuscate issue ownership (Baumgartner and Jones 2015). For example, bills dealing with health care are commonly referred to any of four different House committees (House Appropriations Committee, House Education & the Workforce Committee, House Energy and Commerce, House Ways & Means Committee) and many more subcommittees and corresponding Senate committees, all of which share jurisdiction over national health care.

Referral to multiple committees takes advantage of the diverse information, overlapping jurisdictions, and alternative expertise embodied in the committee structure (Baumgartner and Jones 2015). Multiple referrals acknowledge the multidimensionality of issues and enable legislators to leverage diverse information from committees with different domain specializations in the design of a cohesive public policy. Additionally, referring a bill to multiple committees is a more inclusive way to craft law. It enables a more diverse set of legislators to deliberate on the merits of a proposed policy and have their preferences realized in its text during legislative markup sessions. Although referral to several committees multiplies the number of veto points legislation must traverse to be enacted (Davidson 1988), it results in consideration of more diverse sources of information and enables the involvement of a greater number of legislators in the design of public policy. This produces not only higher quality but also more durable legislation. The

relationship between multiple referrals and the quality of legislation leads to a specific prediction about the relationship between committee referrals and durability.

Hypothesis 1: *Provisions within laws that are referred to multiple committees will be more durable.*

It is worth noting that there are some circumstances in which the text of a bill never receives committee consideration. Post committee adjustments are changes to a bill that the House leadership makes after the bill has been reported out of committee (Sinclair 2012). These adjustments may be minor additions or massive alterations that replace the entire bill with new text, thereby circumventing committee consideration of its content. When Congress modifies a bill in a post-committee adjustment, the bill's new content is not debated within a committee. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (PATRIOT Act) and the Emergency Economic Stabilization Act of 2008 (TARP) were both enacted as the result of post committee adjustments. In the case of TARP, the leadership choose a mental health bill (H.R. 1424) as its legislative vehicle. After H.R. 1424 had been reported from committee, the House leadership voted on special rules that stripped all of its provisions and replaced them with the language of TARP. As a result, Congress enacted a $700 billion financial bailout plan without exposing it to committee scrutiny.

Sinclair estimates that in the modern Congress, roughly half of major legislation is now subject to post committee adjustments and roughly one third is not considered by a committee of the House (2012). Legislators may also fail to deliberate on bills within committee because they have granted fast-track authority to the President in trade negotiations or because they have appointed a special task force to deal with a particular issue. Even in those cases where the task-force is bipartisan, by circumventing committee

consideration, legislators deprive themselves of the expertise available in the committee structure.

Unfortunately, my data does not allow me speak to the impact of post committee adjustments, fast-track authority, or task forces, on legislative durability, per se. Since Congress accomplishes these legislative gymnastics outside of the regular order, it is difficult to identify systematically those bills whose text has been altered, replaced or considered outside of the committee process. For example, relying on TARP's bill number, H.R. 1424, to identify the number of committees that considered its content is misleading because those committees considered the text of the mental health bill that served as a vehicle for TARP, not TARP itself. Although I do not offer specific hypotheses regarding the role of these particular unorthodox procedures, they broadly fall under a set of legislative procedures that reduce legislators' consideration of diverse information and perspectives in the design of legislation.

Truncated Debate

Gathering information and deliberating takes time. It takes time to hold hearings, call witnesses, consult with experts, read legislation, debate its virtues, and decide how to vote. To pass high quality and therefore durable policies, Congress needs sufficient time to gather information on the nature of the problem they are attempting to address, and to deliberate on potential solutions. Legislative procedures that constrain the time lawmakers have to consider a public policy are significant impediments to Congress' ability to pass durable law. In the following section, I discuss the negative effect that truncated debate periods have on legislative durability. In particular, I examine the shortened debate that coincides with the rush to enact bills in the final two months of each Congress and the

curtailed consideration of legislation that accompanies a short period between a bill's introduction and its' enactment.

The accelerated consideration of bills during the final months of a Congress allows Congress to enact legislation that would otherwise die at the end of the second session. At the end of each two-year congress, lawmakers rush to pass those bills that have been lingering under consideration and not yet enacted. This rush is partially evident in the saw-toothed pattern that characterizes legislative productivity in the first, versus the second session of congress (See Figure 3).

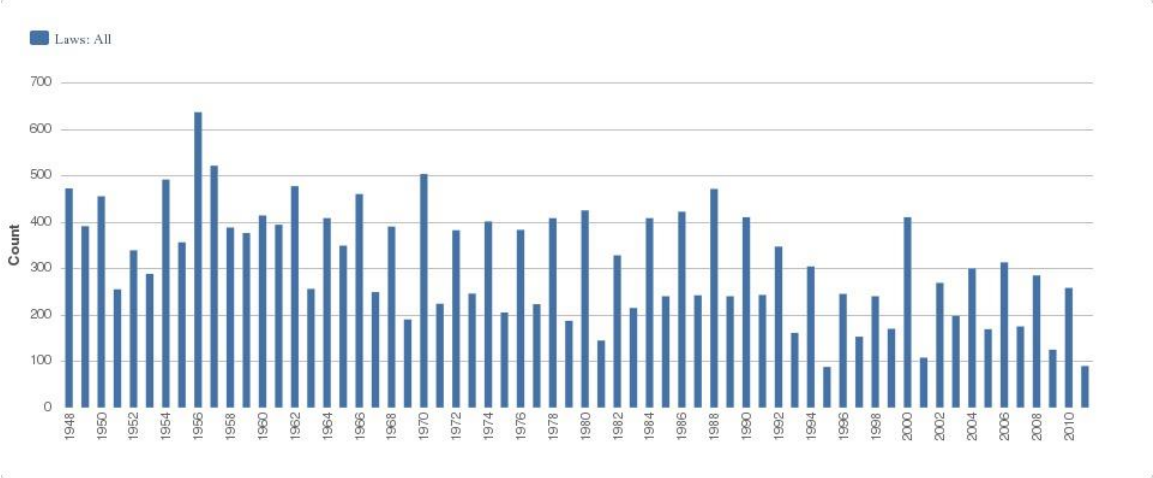


Figure 3: Congress usually passes a far greater number of laws in the second session of a congress (even numbered years), than they do in the first (odd numbered years).

This seasonal effect is often referred to as "running down the clock." The perceived risks of having a bill die during the gap between congresses increases as the end of the second session becomes imminent. This motivates members to hold votes that they otherwise might not in an attempt to ensure that their preferred bills do not die because they've run down the clock on their available time for conducting business (Yackee 2003).

As a result, a greater number of laws are passed right before the holiday break and especially near the end of the second congressional session. When enactment patterns are graphed by month and session, it is clear that Congress enacts a disproportionally greater number of provisions in the last two months of a congress (See Figure 4).

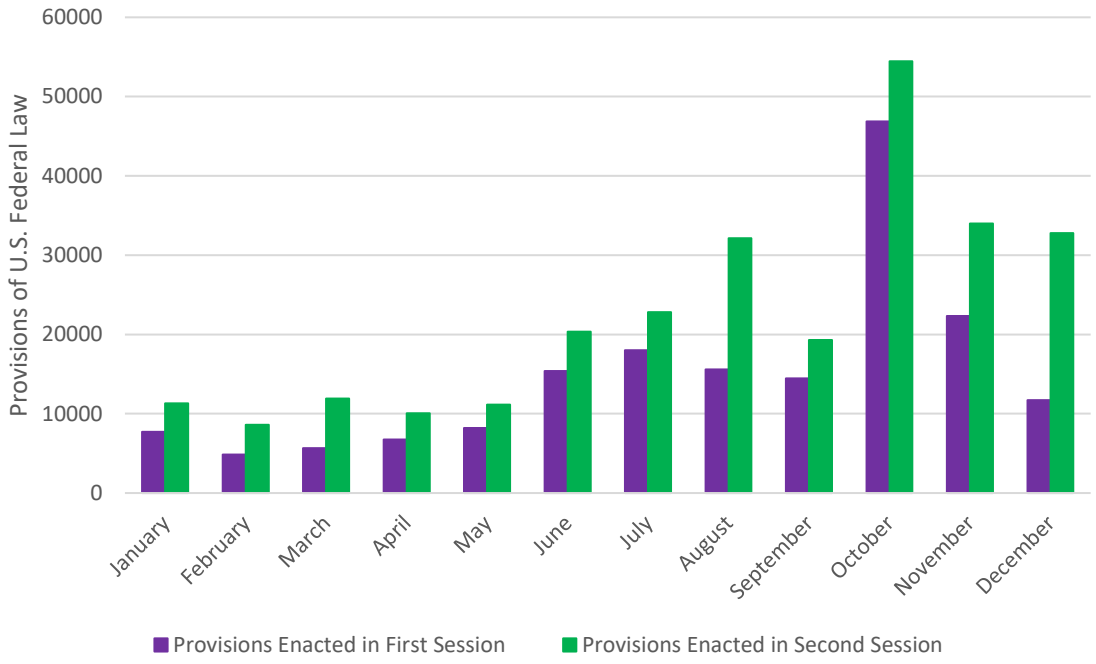


Figure 4: Congress enacts a disproportionately greater number of provisions during the last two months of its second session.

For most months, increased productivity manifests as a modest increase between the first and second sessions, with the exception of August, November, and December, where there is a substantial increase in the number of provisions enacted between the first and second sessions of a congress. The Office of Law Revision Counsel for the House of Representatives, which provides drafting services for bills and amendments, calls the last two months of a congress their busiest period (OLRC 2014). During November and

December, laws that would otherwise die have reached the agenda, and members and their staffs are hurriedly attempting to draft amendments, titles and even new bills before Congress runs out of time to vote on them.

This press of bills, awaiting their chance at passage, constrains the agenda space and forces members to make a trade-off between passing a greater number of bills quickly, with the aid of heuristics, and giving each bill the time and consideration needed to fully apprehend the quality of its content and the degree to which it aligns with their ideological preferences. Additionally, curtailed debate, which typifies hastily passed legislation, does not give the public an opportunity to weigh in on the proposed policy, a source of valuable information about the potential effects of policy. Eskridge and Ferejohn (2010) show that the public's support can help to pass major laws as well as sustain them after enactment. By curtailing debate on a proposed policy, lawmakers rob both themselves of the opportunity to gather information, craft a more effective policy and provide notice to the public of impending legislation.

Absent sufficient time to gather information or deliberate, lawmakers are left with heuristics and cues to guide their consideration of policy, especially when it comes time to vote. Heuristics allow people to simplify a choice in the absence of complex information (Mayhew 1973, Matthews and Stimson 1975, Jones, Talbert and Potoski 2003). The most common heuristic lawmakers employ, in times of haste or uncertainty, is voting with their party, although, they may also take cues from members who represent similar constituencies or from members on the committee of jurisdiction, for particular policy areas (Matthews and Stimson 1975, Cox and McCubbins 1993). As Matthews and Stimson note,

> When a member is confronted with the necessity of casting a roll-call vote on a complex issue about which he knows very little, he searches for cues provided by trusted colleagues who—because of their formal position in the legislature or policy specialization—have more information than he does and with whom he

> would probably agree if he had the time and information to make an independent decision (1975, p.).

Regardless of which heuristics are employed, all seek to reduce the effort and time it takes to read, comprehend and consider the content of legislation. Deciding your support for a measure is notoriously difficult if you do not know what is in it first.[6] During the debate leading up to the passage of the Patient Protection and Affordable Care Act (PPACA) Speaker Pelosi famously said that "We have to pass the bill so that you can find out what is in it" (Rep. Nancy Pelosi, D-California). This was an oddly sincere admission that in a dearth of information, the Democratic leadership expected majority members to trust that the bill's content would align with their party's goals, if not their own preferences.

When lawmakers lack information about the content of a bill's provisions they are unable to judge its quality and incapable of forecasting its effects. The law may solve the problem for which it is intended, be a woefully inadequate, or create additional problems for the government to solve later. Lawmakers have no basis upon which to hazard a guess about a bill's effectiveness unless they, at a minimum, have read it. Additionally, lawmakers are unable to map their preferences onto the various dimensions of the policy under consideration if they aren't familiar with it. Already a hard task in the most information-rich environments (Jones, Talbert, and Potoski 2003), mapping one's preferences onto the content of a bill's provisions uncovers the primary or key substantive dimensions that help lawmakers gauge their support for the overall bill. If lawmakers do not know how their preferences, or those of their constituency, map onto the content of a

[6] Modern legislation has been characterized by marked increase in the use of "secret provisions," in the form of a classified addendum within intelligence and defense legislation (Rudesill 2015). These provisions are among the most extreme examples of legislators not knowing the content of bills before they vote on them. Given that these provisions are neither published in the U.S. Statutes at Large or the U.S. Code, their durability is unknown.

bill, they cannot know which vote, “aye” or “nay,” will produce a change from the status quo that is most amenable to those preferences.

While the use of heuristics to determine vote choice is not confined to the last days of a congressional session, legislators do rely on heuristics heavily during this period because time, a scarce resource, is scarcer still. Even bills that were once familiar to lawmakers, because they were introduced months or even years ago, may have changed significantly on their journey to their final form on the floor. In one particularly striking example of lack of attention to detail, “a one-sentence, 46-word, $50 billion tobacco industry tax break was quietly inserted into a budget conference report,” which was subsequently passed by both chambers, signed into law by the president, and only later discovered to have contained the controversial provision (Oleszek 2013). Congress later repealed it.

Unless lawmakers can take the time to read, consider and debate the content of all bills that come before them during the last hectic days of a Congress, they have little besides heuristics to rely on to make decisions. Hasty and heuristic-based votes limit or negate the opportunity for lawmakers to gather information, identify common ground and arrive at a compromise that will endure. “Legislation is hard, pick-and-shovel work,” and it often “takes a long time to do it” (Rep. John D. Dingell, D-Michigan). Unless you take the time, you do not pass durable law.

The hectic and bloated schedule that characterizes the last few weeks of a congress can result in truncated debate, but so can a short period between a bill’s introduction and enactment. Most bills are introduced early in a legislative session and therefore have the potential to be considered over the course of several months or up to two years. Others are introduced, bypass deliberation, and are almost immediately voted on. In his 2015 book “Legislating in the Dark,” James Curry argues that truncated consideration periods are tools

wielded by the House leadership to restrict members' access to information about the content of legislation. For example, House leaders expected the Democratic caucus to pass the 2009 financial stimulus bill, which contained over 1,100 pages, yet it wasn't made available in its final form until thirteen hours before debate was set to begin. It was passed twenty-eight hours later, although most legislators didn't have time to read the bill, much less debate its merits (Curry 2015). The use of truncated debate periods is becoming more routine as House leaders attempt to pass legislation in a highly polarized Congress. This practice has filtered down to state legislatures, where it is now commonplace for lawmakers to introduce a bill and immediately call for a vote on its passage. Writing about Utah's legislature, a local journalist lamented that "last minute bill presentation means a bill may actually appear so late the committee hearings and public debate is entirely circumvented" (Burningham 2012). A short period between a law's introduction and its subsequent enactment results in lawmakers giving each provision less consideration than they otherwise would, thereby forcing them to rely on heuristics to guide their votes.

By truncating the time lawmakers have to consider and craft legislation, they are unable gather information and deliberate on the proposed law's merits and must rely on heuristics to decide their support for a measure. Alternatively, by not limiting time for debate and deliberation, lawmakers can engage in entropic search, which will increase the quality of the legislation and give members an opportunity to identify the shared ground for a potential compromise. The importance of time for crafting and enacting high-quality legislation leads to two specific predictions about the relationship between time and the durability of federal provisions.

Hypothesis 2: *Provisions within laws that are enacted in the last two months of a congress will be less durable.*

Hypothesis 3: *Provisions within laws that have a longer period between their introduction and enactment will be more durable.*

The Role of Experience

Congress varies in the experience it has legislating in particular policy domains. Experience can be a valuable source of information. The more experience Congress has legislating in a policy area, the more information lawmakers have about what works in that domain and what doesn't. The less experience Congress has, the more uncertain lawmakers are and the more reliant they must be on an exhaustive information search and deliberation to identify solutions that will work. For example, Congress has 227 years of experience crafting provisions in the domain of Law and Crime policy, whereas it has only 94 years of experience crafting provisions in the domain of Science and Technology. This means, for example, that at the subtopic level, Congress has far more experience determining sentencing guidelines for violent crimes than it does regulating the internet. As a result of the important role that information plays in crafting high quality and durable law, I argue that the more experience Congress has in a particular policy domain, the abler lawmakers are to enact durable provisions within that domain.

New Issues

Uncertainty characterizes most governing decisions, but never more so than when an issue is new. By taking a long view of politics in the United States, it becomes clear that the current mix of issues on Congresses' agenda is far different from the mix of issues that characterized early lawmaking. In the early years of the Republic, every issue was new, in the sense that Congress had never before deliberated on it, nor proposed government solutions to it. For example, the Civil War Pension Program, passed in 1862, marked the

first time the federal government attempted to provide welfare for citizens. Similarly, the First Bank of the United States, championed by Alexander Hamilton and chartered by Congress in 1791, marked the first time that the federal government undertook to create, monitor and regulate the nation's monetary supply. In the modern Congress, laws regulating the internet, for example, mark a foray into an entirely new and uncharted area of policy-making. Deliberation on new issues is hindered because information concerning the nature of the problem is scarce and Congress has little experience to inform their selection of a solution.

Jones, Talbert and Potoski (2003), Jones and Baumgartner (2005) and Shaffer et al. (2016) argue that a lack of reliable information about a problem or confusion on how to prioritize that information results in uncertainty. Conditions of uncertainty influence how decision makers choose to weight the dimensions of an issue under consideration. They claim that uncertainty in political decision-making should be highest in two kinds of circumstances: "when issues that reach the public agenda are new and ill-understood or when a crisis or when a set of circumstances force politicians to re-frame an issue by recognizing one or more attributes that were previously unrecognized" (Shaffer et al. 2016, p. 6). Jones and Baumgartner (2005) term this disruption "attribute intrusion." This uncertainty may abate as the new issue becomes more understandable or the crisis eases (Jones, Talbert, and Potoski 2003).

Deliberation on new issues is hindered not only because information concerning the nature of the problem at hand may be scarce, but also because Congress has no direct experience to inform how they select and craft a solution. Politics is widely regarded as a learning process in which responses to public problems proceed in a trial-and-error fashion (Lindbloom 1959, Heclo 1974, Hall 1993). Congress gains its greatest measure of institutional learning the first time it encounters an issue, selects a solution and observes

how and why it fails or succeeds in implementation. With greater experience in an issue area, Congress may propose solutions that more effectively marry problem and solution and are therefore more durable.

The first time the United States undertook to provide welfare for Civil War veterans and their families, they faced just such a learning opportunity. Providing a federally-directed system of welfare was an entirely new undertaking for the U.S. Government, and although information was scarce, they could call upon the experience of world history to help them in their deliberations. Throughout all human history, peoples have faced some measure of uncertainty brought on by the calamities of life: hunger, unemployment, illness, disability, death and old age. Solutions to reduce economic instability have been as numerous and varied as the cultures and civilizations that proposed them.

In the early Greek city states, economic security took the form of amphorae (jars) of olive oil. Olive oil was widely available, nutritionally dense, and unlikely to go rancid unless stored for an overly long period. An amphora of olive oil was the Greek version of a rainy day fund. In Ancient Rome, Gaius Octavius, who later took the title Augustus, initiated the provision of the subsidized grain dole for citizens who could not afford to buy food. In medieval Europe, feudal lords were responsible for the lives and economic well-being of their serfs. During this time, the virtue of private charity was extolled as a means to help the poor and destitute. In 1601, the English Parliament passed the Poor Relief Act, which created a national poor law system for England and Wales that was locally administered.

Even this wealth of information about prior policy experiments was not rich enough to enable Congress to predict the challenges they would face in implementing the Civil War Pension Program of 1862. At the time of its enactment, the measure was recognized as the single costliest government appropriation of its time and “the most liberal pension

measure ever passed by any legislative body in the world" (McConnell 1992, p. 153). Its enactment was contentious, and its implementation faced criticism regarding fraudulent pension claims almost immediately. The program was administered locally and without substantial oversight, which critics claimed made it amenable to political patronage and other forms of corruption (McConnell 1992, Orloff and Skocpol 1984, Skocpol 1992). These concerns mounted until the program was widely perceived as being rife with fraud, waste and abuse. The true extent of these allegations are unknown. After carefully examining historical pension records, Theda Skocpol concluded:

> …that nothing exact can be said about the proportions of illegitimate pensioners or expenditures. We can only speculate that some (undetermined) thousands, or conceivably tens of thousands, of the nearly one million pensioners in 1910 were bogus. Perhaps aided by dishonest pension attorneys, these men and women had exploited the loose and locally rooted application system to obtain fraudulent pensions or—in most cases, I suspect—overly generous benefits (1992. pg. 145.)

In addition to claims of fraud, the pension program was plagued by minor variations in statutory language that led to problems of interpretation. For example, sections 1 and 2 of the Act provide eight to thirty dollars per month for total disability, but nowhere define what physical conditions constitute total disability. After passing multiple laws that attempted to amend and restructure the delivery of Civil War pension benefits, Congress finally repealed the initial act on August 10, 1956 (70A Stat. 1). Since then, Congress has added to its institutional knowledge about what works and what does not in military pension programs and welfare programs more generally.

Even if an issue isn't strictly new to Congress in the institutional sense I have discussed above, an issue may be new to some legislators in its ranks. "Although newly elected members of Congress may carry with them into the legislature policy preferences in some subjects, they will face many issues there for the first time. Moreover, even veteran members of Congress are forced to address new issues as they move to new committees or

as the legislative agenda changes over time" (Bessette 1994, p. 54). Like the institution, its members gain information and experience in different policy areas by engaging with them. New issues for individuals, and especially for Congress as an institution, are more difficult to address with lasting solutions. This means that over the history of U.S. policy-making, as new issues intrude into Congress' agenda, we should expect that the solutions Congress poses in response will be less durable than those proposed once Congress has learned from its initial mistakes. This expectation leads to a specific prediction about the relationship between Congress' domain-specific experience and legislative durability.

Hypothesis 4: *Provisions within policy domains that Congress has more experience legislating on will be more durable.*

Old Issues and Established Law

Congress' prior experience in an issue area is a double-edged sword. While experience gives legislators a larger store of information to draw upon, it also means that new legislation must fit into an ever increasing abundance of established provisions. If Congress fails to take into account this extant legal corpus in the design of legislation, they run the risk of enacting provisions that generate unintended consequences as a result of a poor fit with this existing structure. Provisions that are not synergistic with existing law are less durable. Deliberation plays an important role in mediating the risk of ephemeral law, by giving legislators an opportunity to consult with experts to determine how a new law will modify and fit into established law.

Modern lawmaking takes place in the shadow of a massive extant legal corpus. In our complex legal system, lawmaking is frequently less about generating new laws from whole cloth than remaking and tweaking legal obligations inherited from the past. New

laws are, by their very nature, related to and dependent upon the laws that precede them. Specifically, whenever legislators, their aids, or members of the Legislative Counsel draft legislation, they are not starting with a clean slate, rather they are adding onto an existing legal structure. As such, this structure must be considered during the drafting phase to fit the proposed provisions into the existing complexities and requirements of an already established policy area.

As a result of each new law needing to fit into a well-established policy structure, legislation is crafted with a greater number of provisions that make such a fit possible (Whyman and Jones 2012). These extra provisions increase the average number of provisions in new legislation, which further expands the size of the U.S. Code. Such a process is characteristic of a positive feedback system, whereby the creation of new law increases the size and complexity of the Code, which in turn necessitates the passage of even longer and more complex pieces of legislation to fit into an ever-evolving and expanding legal and regulatory structure. Over two centuries, our republic has built up a corpus of law that as of 2012, included more than twenty-two million words. Every new provision must fit into this existing legal structure, and do so without generating unintended consequences, in order to endure.

The build-up of old laws affects legislative durability in two ways. First, it puts lawmakers at an informational disadvantage if they do not know about the contours of the extant legal corpus. This makes passing durable laws more difficult because they must be crafted to fit into a large and sometimes baffling extant legal structure. This is especially true of modern lawmaking. If new provisions are not synergistic with this existing structure, they are likely to be ephemeral. Since many interconnected laws form the basis for policies, knowing the effect of enacting, repealing or omitting any single provision is often hard for legislators. If they add or pull the wrong card, will the whole house of cards

collapse? For example, a House member was recently dismayed to find that a law he had helped pass included a provision that changed termination dates on one program that happened to result in the elimination of a cherished milk subsidy in a related program. The member immediately called for the repeal of the recently passed provision that had wreaked havoc on the older subsidy (OLRC 2014).

Second, the build-up of law means that some policies have become entrenched over time, making them harder to repeal or omit. This is the path-dependent nature of lawmaking. "Path dependence has to mean, if it is to mean anything, that once a country or region has started down a track, the costs of reversal are very high. There will be other choice points, but the entrenchments of certain institutional arrangements obstruct an easy reversal of the initial choice" (Levi 1997, p. 28). Entrenched policies act like weeds with deep roots. If Congress, the courts, or bureaucratic agencies want to dismantle them, they must repeal or omit the original legislation, as well as any legislation that has accreted on top of the original enactment. Thus, a complex legal environment created by the build-up of law raises the costs of repealing or omitting any single provision.

The prior discussion leads to two contradictory hypotheses regarding the effect of the build-up of law on the durability of federal provisions. The first hypothesis is based on the premise that the build-up of law makes it harder for legislators to craft durable provisions because they must fit into an extant legal corpus without generating unintended consequences. This leads to a prediction postulating a negative relationship between the build-up of law and the durability of federal provisions.

Hypothesis 5: *Provisions enacted within policy domains characterized by a large build-up of extant law, will be less durable than provisions enacted within domains with a modest build-up of extant law.*

The second hypothesis is based on the premise that the build-up of law insulates policies from repeal or omission because legislators, bureaucrats, and justices are uncertain of the costs of nullifying a provision within an entrenched policy domain. This leads to a prediction positing a positive relationship between the build-up of law and the durability of federal provisions.

Hypothesis 6: *Provisions enacted within policy domains characterized by a large build-up of extant law, will be more durable than provisions enacted within domains with a modest build-up of extant law.*

Although I am agnostic concerning the direction of the effect of the build-up of law on the durability of federal provisions, increases in the density of provisions in particular policy domains undoubtedly influences modern lawmaking (Jones, Whyman and Theriault 2016), if not the durability of federal provisions.

SUBSTANTIVE COMPROMISE

The search for diverse sources of information and deliberation are necessary, but not sufficient conditions for crafting an enduring policy. Legislators must also compromise to pass the most durable law. Entropic information search and inclusive debate both precede compromise because they uncover the facts, arguments, and preferences that form the basis for negotiating a compromise. In the following section, I argue that it is not enough that policy simply is effective at achieving its intended aims. To avoid being dismantled, it must also represent a substantive compromise among the diverse interests that characterize Congress to endure changes in party control of government.

Before delving into a theoretical discussion of the effect of compromise on durability, it is helpful to see an example of this dynamic in action. In his autobiography,

former Congressman Henry Waxman describes working with Paul Rogers, compromiser par excellence. Rogers was a moderate Democrat and chairman of the Subcommittee on Health and the Environment during the time Waxman was a junior representative. When Rogers led discussions on what changes or amendments might improve legislation, Waxman noted that he "operated as though party affiliation did not exist, soliciting input as readily from Republicans as Democrats" (Waxman 2009). Waxman argues that

> The genius of Rogers's method was manifold. Because everyone's views were considered, we all felt invested in the bill, even if it did not end up going our way. Because bills were never rammed through on party-line votes, Rogers could frequently put together different coalitions of Republicans and Democrats, which made it harder for special interests to influence the process and much easier for us to pass good legislation (Waxman 2009).

By facilitating compromise between Republicans and Democrats, Rogers successfully helped draft and pass bipartisan landmark enactments such as the National Cancer Act, the Emergency Medical Services Act, and the Clean Air Act of 1970, among many others. As a testament to the depth of compromise Rogers achieved, the Senate passed the Clean Air Act of 1970 unanimously, and only one representative voted against the bill. During the signing ceremony, President Richard Nixon applauded the bipartisan effort that went into crafting the bill and said, "As we sign this bill in this room, we can look back and say, in the Roosevelt Room on the last day of 1970, we signed a historic piece of legislation that put us far down the road toward a goal that Theodore Roosevelt, 70 years ago, spoke eloquently about: a goal of clean air, clean water, and open spaces for the future generations of America" (Nixon 1970). Of the 90 provisions in this landmark enactment, only five have been repealed by Congress and none omitted by the other branches. Because it was carefully crafted and represented a substantive compromise, the Clean Air Act of 1970 has been a remarkably durable piece of legislation, despite the fact that environmental policy has since become a partisan issue.

Informed by Bessette (1994) and Gutmann and Thompson (2013), I define compromise as an agreement born of reasoning on the merits of public policy, in which all sides sacrifice something in order to improve on the status quo from their perspective, and in which the sacrifices are at least partly determined by the other side's will. I add to this that a substantive compromise requires that each side's sacrifice take the form of a shift in its preferred policy position in legislation. Substantive compromises deal with compromises on the actual substance of a law. The substance of a law is all that it contains, every word of its text. Every provision within a bill has the potential to represent a substantive compromise on its own merits. By making these sacrifices in the form of shifts in their preferred policy positions, and thus compromising on the substance of legislation, lawmakers enact policy that garners bipartisan support and a larger enacting coalition, both of which help inoculate the law against partisan attempts to dismantle it. In a majoritarian system dominated by two major political parties, bipartisan support for a policy is partial evidence of compromise. However, there are some circumstances in which a policy garners bipartisan support, but does not represent a substantive compromise.

It is often helpful to understand what a concept is not, in order to understand what it is. Compromise is not bargaining, being different in key respects. Compromise deals with reasoning and sincere agreement on the substance of a policy. Bargaining deals with vote trading and the formation of enacting coalitions that obscure legislators' true preferences. Bargaining can take several forms including logrolling, in which legislators trade support for each other's proposals, omnibus law-making, in which legislators bundle separable proposals together (sometimes with controversial provisions), and the use non-germane provisions, which become law only because they are tethered to another policy.

In the following sections, I describe how logrolling, omnibus legislation, and the inclusion of non-germane provisions in legislation, all serve as impediments to reaching a

substantive compromise. Because they make compromise less likely, they also reduce the durability of federal law. It is worth noting that the preponderance of previous scholarship on durability has focused on determinates of legislative durability associated with the political context at the time of a law's enactment (Ragusa and Birkhead 2015, Jenkins and Patashnik 2012, Glazer 2012, Barry, Burden and Howell 2010, Ragusa 2010 Maltzman and Shipan 2008). No previous studies have posited nor systematically analyzed how the construction and content of a piece of legislation affect the durability of its provisions until this dissertation.

The Role of Policy Focus

Passing logrolled bills, omnibus legislation, or bills with non-germane provisions are bargaining tactics, which are impediments to the realization of substantive compromises, because they require trade-offs between discrete, separable policies either within, or between legislation. Additionally, the consideration of legislation that bundles policy areas either within, or between legislation, constructs a decision space that is inherently multidimensional and in which legislators' preferences are likely not single-peaked. This deprives members of an opportunity to reveal their sincere preferences for each separable policy. If members vote for a bundled piece of legislation, then unless they sincerely prefer that all policies they are jointly considering be enacted, they are not truthfully revealing their preference. The trade-offs that are inherent in voting for legislation that addresses multiple policy domains or logrolled bills make a substantive agreement on the content of provisions far less likely. If legislators do not support a provision on its own merits, they are less likely to defend it against attempts by subsequent congressional coalitions, the courts or bureaucratic agencies, to repeal or omit it.

Logrolling

Logrolling is an exchange of voting support on different bills by different members of Congress. Its proponents argue that it is both an effective means of coalition building and a reflection of the reality that members are rarely equally concerned about all the measures before Congress. When members engage in logrolling, they informally abdicate their responsibility to represent their constituency's interests on one issue, but embrace this responsibility on an alternative issue. The passage of a logrolled bill, even with many votes, cannot claim to be the result of a substantive compromise on the content of its provisions. "Compromise, unlike logrolling, builds coalitions through negotiation of the content of legislation. Each side agrees to modify policy goals on a given bill in a way that is generally acceptable to the other" (Oleszek 2014).

One prominent example of a classic logroll involving unrelated bills is the Food Stamp Act of 1964, one of the pillars of Lyndon Johnson's Great Society program. An early incarnation of the policy (1964) was passed by virtue of a shamelessly overt logroll, and later incarnations (discussed in a subsequent section on omnibus legislation) were passed by being bundled together with the Farm Bill as an omnibus measure. In 1964, liberal Democratic supporters of the Food Stamp bill faced solid Republican opposition and the inconvenient prospect that some conservative Democrats might defect. "On the eve of the [House] vote, supporters were still some votes short of a majority. They knew, however, that their votes would be needed for the passage of the pending wheat-cotton farm bill, much desired by Southern and Rural Democrats. Thus evolved the strategy of tying the votes on the two bills together" (Bessette 1994).

The deal required that Northern and Urban Democrats trade their support for the wheat-cotton bill in return for conservative and mostly southern Democrats' support for the Food Stamp bill. Randall Ripley describes the evolution of the trade:

> Gradually during March it became clear that the trade would involve the food stamp bill and the wheat-cotton bill. No formal announcement was made of such a trade. Indeed, no formal meeting was held at which leaders of urban and rural blocks agreed on it. Instead, and this is typical of the operations of the House, it was a matter of favorable psychological climate. The more the individual members and the press talked about a specific trade of rural votes on food stamps for urban votes on wheat-cotton the more firmly the exchange became implanted in the minds of members (1969, p. 300)

To ensure that all parties kept their side of the bargain, House leadership arranged for the votes to take place in successive order. Scheduling both votes close together ensured that members knew what was expected of them and made what had just occurred transparent to the press. By trading votes, members successfully passed both bills: food stamps, 229-189, and wheat-cotton, 211-203 (Bessette 1994). As is made clear in the next section, the current manifestation of the food stamp policy (SNAP) is in danger of being dismantled because modern Republicans would like to vote for the policy independently from other policy considerations. This is a prescient example of how logrolling builds coalitions that are incapable of sustaining a policy because a substantial proportion of members' true interests do not align with its aim. Such measures fail to attract a sincere and vigorous cadre of supporters that can or will defend them against attempts to repeal or omit their provisions.

Unfortunately, I am unable to empirically observe instances of logrolling outside of obvious cases where lawmakers are transparent regarding their intentions. As a result, I may not offer a testable hypothesis regarding the effect of logrolls on legislative durability. I do, however, offer a specific hypothesis concerning omnibus legislation.

Omnibus Legislation

Omnibus legislation is distinguished from logrolling in that trade-offs take place within bills rather than between them. Omnibus is derived from the Latin, "for everything." Omnibus bills contain separable policies that manifest as huge titles or divisions of a law that originally were, or could be, conceived as stand-alone laws in their own right (Krutz 2001). A familiar example of an omnibus measure is the United States Farm Bill, the primary vehicle for federal agricultural and food policy. In the decades following the Great Depression, Congress dutifully considered and passed the Farm Bill with relatively little controversy every five years. It was originally conceived as a means to assist the nation's struggling farmers and protect a vulnerable food supply. After the logroll described in the prior section, Congress modified the bill to include provisions that were aimed, not at assistance to farmers, but at providing food and nutritional assistance through programs like SNAP (Supplemental Nutrition Assistance Program), also called "food stamps." Funding allocations for these programs can normally be found in the "nutrition" title of the farm bill and regularly constitute more than 80 percent of its spending. What had long been a bipartisan and noncontroversial measure, morphed into the subject of hotly contested debate.

Republican members of the 113th Congress argued that given their membership's divergent preferences on its separable parts, the nutrition title and the agricultural title of the farm bill should be split and voted on individually. Their opponents contended that such a split would jeopardize the passage of the nutrition title (Weisman and Nixon 2013). Considering these separable policies in the same bill enabled its regular passage because it united urban interests concerned with the provision of food stamps and nutrition programs,

with rural interests that are dependent on farm subsidies. Uniting these policies into a single bill regularly attracted a large coalition of supporters to secure its enactment; however, in this case, support may appear broad, but in reality, it is superficial.

A vote for the farm bill does not necessarily indicate a lawmaker's substantive support for both nutrition and agricultural programs. A member may support one program and not the other, yet feel compelled to vote for the entire package to secure the passage of the portion they most ardently wish to see enacted. In this case, the result is not a compromise on the substance of the legislation, but a bargain that manifested as a trade-off between separable policies.

The farm bill is far from unique. In fact, the use of omnibus legislation has increased over the last few decades, in part because such measures have proven to be effective vehicles for controversial provisions.[7] Omnibus bills have been used more frequently "since the 1980s, in part because party and committee leaders can package or bury controversial provisions in one massive bill to be voted up or down with limited debate and few (if any) amendments" (Oleszek 2014). Figure 5 shows that beginning in the 1960s, Congress enacted laws that contained more provisions while simultaneously addressing a greater number of disparate policy areas. Barbara Sinclair estimates that in the modern Congress roughly twelve percent of all major measures and 20 percent of all measures are omnibus (2012).

[7] Interestingly, at the same time the use of omnibus legislation at the federal level has increased, state legislatures have started enacting single subject rules for both their own business and ballot referenda to combat concerns associated with achieving substantive clarity and compromise on votes for omnibus legislation or ballet measures (Cooter and Gilbert 2010; Gilbert 2005, 2011; Kaminski and Hart 2012; Lowenstein 1982; Matsusaka and Hasen 2010).

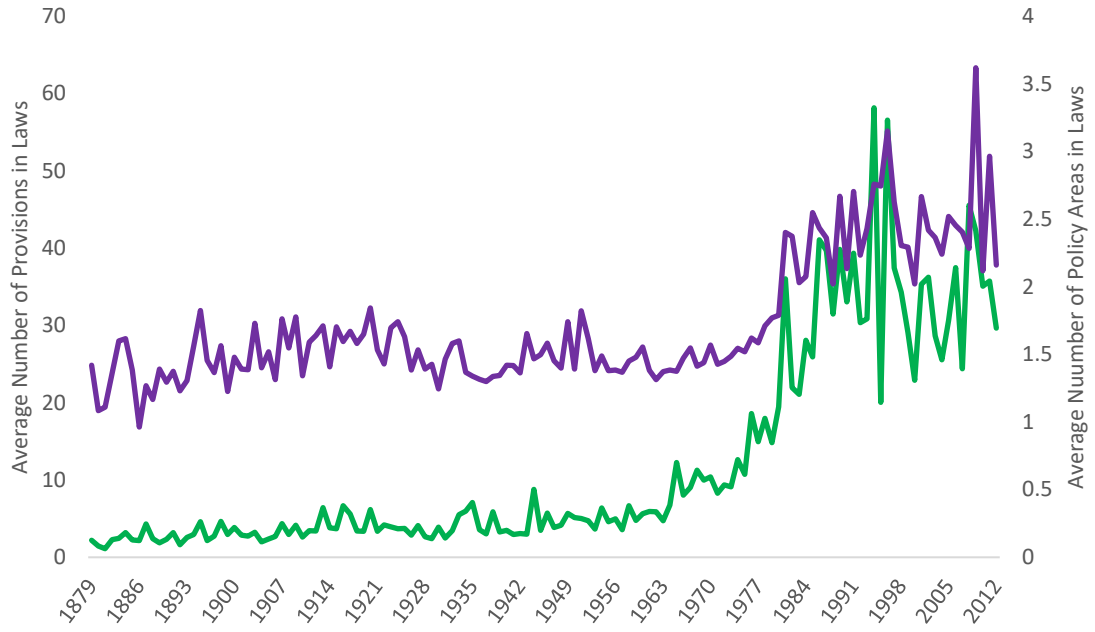


Figure 5: Changes in the Internal Complexity of Public Laws (1879-2012). After reconstruction and beginning in the late 1950s, the average number of policy areas addressed in laws and the average number of provisions contained within laws, increased.

Any provision, noble or nefarious, that is passed simply by being included with a proposal preferred by the enacting majority cannot claim to be the result of a substantive compromise. It is the result of a trade-off between policies. Since a single vote for all separable parts is not indicative of shared common ground across the policies under consideration, it is highly unlikely that such a vote represents a substantive compromise. Additionally, bundling policies or including extraneous provisions have demonstrable effects on the ideological position of omnibus bills relative to non-omnibus bills. Goertz (2010) finds that omnibus legislation is, on average, farther from the median voter's ideal point than legislation dealing with a single area because it includes vote-trading on nongermane provisions. In cases of vote-trading, the enacting coalition is not genuinely interested and invested in protecting the separable parts from repeal because at least some

of the separable parts do not represent their true preferences. The law may have been passed as a whole, but it can be taken apart piece by piece.

Additionally, there is evidence that non-policy-focused legislation is more likely to be fast-tracked through the committee process and consequently given less consideration by members than the average bill (Sinclair 1997). Such treatment means that lawmakers lack time to take into account diverse information and preferences in the design of the legislation before it reaches the floor for a vote. Because fast-tracking bills reduces the quality of the resulting laws, they are less likely to endure. Furthermore, because diverse member preferences may not be represented in the content of the bill, once it becomes law, those members have less incentive to preserve it against attempts by future coalitions to dismantle it.

Lastly, legislation that is fast-tracked, contains many provisions, and addresses multiple policy areas puts members at an acute informational disadvantage (Sinclair 1997). Members may not be aware of the content of the bill they are seeking to make law. As discussed in prior sections, if legislators are not aware of the content of the bills they vote on, they risk passing legislation that is a poor remedy for the problem they are trying to solve. Additionally, the resulting law may not conform to their true preferences and consequently, will be less durable than those laws which are short, policy focused and lent themselves to greater transparency in both process and content.

Because separable policies in omnibus legislation are lower quality and garner less legitimate support from lawmakers, they are less likely to endure. This prediction is spelled out succinctly in hypothesis 7.

Hypothesis 7: *Provisions within omnibus legislation will be less durable.*

Formula One Theory of Germaneness

Non-germane provisions are not relevant to the core subject addressed in legislation. They may be understood in the same general category as omnibus legislation, because they have a similar construction and therefore, similar durability. In the case of non-germane provisions, two or more separable provisions are included in legislation, which may garner enough votes to pass, but, like omnibus legislation, the provisions themselves are not a result of a compromise. Non-germane provisions rely on being tethered to the core provisions that serve as the focal point of a bill to secure their passage. As such, non-germane provisions are at a greater risk of repeal or omission because they are not enacted on their own merit.

Non-germane provisions may be inserted into legislation during most stages of the legislative process, although House and Senate procedures vary. These provisions may already be included in a bill before it is introduced, or they may be added during a committee mark-up session. Unlike House members, Senators may offer non-germane amendments after a bill has been reported from committee. Non-germane amendments or "poison pills" may be inserted into legislation during the amendment process in the Senate to force an unpalatable vote on the majority (Gutmann and Thompson 2012, Theriault 2013). Non-germane provisions may also be included as riders "to move controversial proposals through the legislative process while avoiding the need to construct coalitions in favor of the particular measures" (Krutz, 2001 p.5). Since provisions of this type are not indicative of shared common ground and are more likely to offer particularized benefits (Mayhew 1974), they are less likely to attract a cadre of supporters capable of staving off any concerted efforts to repeal or omit them.

Non-germane provisions are ancillary to a law's core policy domain. That is, they are outside of the policy area that the original bill was designed to address. The core policy area addressed in a law is the reason that law reached the governmental agenda. It is the main aim of the law. Because they are peripheral to the core content of a law, non-germane provisions are less likely to endure than provisions within the same law that address the law's core policy content.

Non-germane provisions are much like the peripheral parts of a formula one race car. Formula one race cars are designed to rapidly decrease momentum during a crash by shedding peripheral parts and materials, leaving the monocoque, the safety capsule in which the driver sits, intact. Unlike the peripheral parts and materials that surround it, the monocoque of a race car is incredibly strong and able to withstand enormous impacts, thereby protecting the driver. In this analogy, the peripheral parts that fly off the race car are akin to non-germane provisions, which are less likely to endure. While the monocoque, which is designed to withstand the impact of a crash without deforming, is akin to those provisions that belong to the core policy area of a law and are more likely to endure. Non-germane provisions are often enacted simply because they have been inserted into "must-pass" legislation. Much like omnibus legislation, lawmakers will vote for bundled law to ensure the passage of the provisions they legitimately support, even if this results in provisions they don't support becoming law. Because non-germane provisions garner less support they are less likely to have supporters who are willing to defend the provisions against repeal or omission after enactment. The relationship between lawmakers' lower level of support for non-germane provisions and higher support for provisions addressing the core policy area of a law has consequences for provision level durability.

Hypothesis 8: *Provisions addressing the core policy area of a law will be more durable than those addressing peripheral policy areas (Formula One Theory of Germaneness).*

The use of logrolled bills, omnibus legislation, and non-germane provisions are all impediments to the enactment of durable legislation. They fail to attract sincere and vigorous supporters who are invested in the defense their provisions after passage.

In the next section, I discuss additional features of the legislative process that serve as impediments to the realization of a substantive compromise. I begin with a general discussion of the negative effect that procedures that stymie the inclusion of minority preferences have on legislative durability. I then discuss specific features of the legislative process that make reaching a compromise less likely, including small and partisan enacting majorities, restrictive rules, and polarized unified governments.

The Role of Procedural Tactics

A procedure is simply the process by which something gets done. In the context of legislative bodies, rules and norms govern the introduction, consideration, and passage of legislation. Congressional procedures include precedents and rules ranging from how many amendments may be proposed to legislation, the number of votes it takes to pass legislation, and even which members can speak and in what order, during debate. Some procedures facilitate the inclusion of minority preferences in legislation, such as the Senate filibuster, while others are employed as a weapon against the minority to stymie the inclusion of their preferences, such as rules limiting debate or amendments (Oleszek 2014). Every piece of legislation must navigate a gauntlet of procedures and rules before Congress can enact it. Thus, every law is the product of both its substance and the procedures used to secure its passage.

The prior section showed how the construction of legislative agreements can impede a substantive compromise on individual provisions of law. This section explores how legislative tactics can be leveraged to thwart a substantive compromise. Legislative

tactics are aimed at restricting who has a say in the outcome of legislation. They are tools, often wielded by the majority, to enact policies that represent a subset of legislators' preferences, by restricting minority input. This stands in contrast to substantive compromises, born of deliberation, which aim to give the maximum number of lawmakers an opportunity to shape the outcome of the policy under consideration.

Congressional procedures, rules, and precedents fill multiple tomes. Indeed, the Parliamentarian of the House of Representatives has twenty-eight bound volumes that record precedents employed throughout the last 227 years, to provide members with nonpartisan guidance on the full range of parliamentary rules and procedures available to them. While it is not within the scope of this dissertation to examine the probable effect of every precedent, rule, procedure, and norm on the prospect for compromise, my aim is to identify those procedural devices that pose the strongest obstacle to compromise, and which are often employed enough to be readily observable.

Small or partisan enacting majorities, rules that limit debate or amendment, and polarized unified governments are all significant impediments to compromise and occur frequently enough to pose a considerable and ongoing threat to Congress' ability to pass durable law. Each of these elements of the lawmaking process and their theorized effects on legislative durability are considered in greater detail below.

The Role of Enacting Majorities

Laws that boast large and bipartisan enacting coalitions are more likely to represent a compromise between the diverse interests and perspectives that characterize the United States Congress. Further, the most durable laws will have a large and bipartisan cadre of supporters to support and defend their provisions after enactment. Small enacting

majorities are evidence that fewer legislators were willing to support a policy in its final form. Partisan enacting majorities are evidence of a lack of compromise as well as a harbinger of decreased durability. Partisan enacting majorities indicate that the majority party chooses to "go it alone" rather than compromise with members of the minority on the substance of policy. Both small enacting majorities and partisan enacting majorities limit the durability of the provisions within the laws they enact.

Small Enacting Majorities

In February 2010, Democratic leaders announced their intent to "go it alone" on their landmark health care bill and to employ a little known parliamentary device called budget reconciliation to secure its passage. They claimed it would work this way: the House would pass the health care bill already approved by the Senate, then both chambers would approve a separate package of changes through the Senate's budget reconciliation process, thereby avoiding the necessity of a cloture vote to end a filibuster. The resulting legislation would revise the Senate health bill to reflect compromises between House and Senate Democrats and suggestions by President Obama. When questioned on the use of the convoluted procedure, originally meant for the consideration of budget bills, Speaker Pelosi said, "What you call a complicated process is called a simple majority. And that's what we're asking the Senate to act upon" (NYT, February 27, 2010).

By long practice, bills are considered to have passed Congress if they garner a simple majority of the vote in both the House and the Senate. If at least fifty percent of legislators vote "aye" on a measure, that measure has garnered a simple majority. In the case of the health care bill and attendant amendment bill, they were passed by simple majorities, using the budget reconciliation process, and soon thereafter signed into law as

the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act, by President Obama. Ultimately, the primary vehicle for the most significant regulatory overhaul of the U.S. healthcare system since the passage of Medicare and Medicaid in 1965 was passed by "aye" votes in 60 percent of the Senate and just 50.3 percent of the House. Simple majorities are a powerful force in U.S. lawmaking.

As students of the Greek and Roman democratic experiments, the architects of our constitutional republic were deeply concerned with the power of the majority to exert its will over the minority (Federalist no. 10). To forestall potential abuses, they erected impediments to majoritarian rule. Among these are the supermajority requirements for amending the Constitution, Senate and House override of a presidential veto, or Senate approval of treaties. Interestingly, they make no such provision for the passage of legislation. In fact, the language of Article 1, Section 7, Clause 2 of the Constitution, also known as the Presentment Clause, makes no reference to the size of the majority required to pass legislation. The clause simply refers to bills "which shall have passed" the legislative houses. In practice, this has been interpreted as a simple majority. The House or Senate could, instead, choose to employ supermajority rules to govern the passage of bills. They normally do not, for the obvious reason that it would make it even harder to pass legislation than it already is[8]. Although supermajorities are normally not required to pass legislation and are often inconvenient, they are nonetheless harbingers of durable law.

The larger the enacting majority is, the larger the cadre of supporters that can defend the new law against attempts to repeal or dismantle it, post-enactment. The smaller the enacting majority, even if bipartisan, the smaller the group of legislators will be to defend a law against attempts to repeal it. Additionally, a larger enacting majority indicates that a

[8] In practice, the Senate filibuster makes it impossible to vote on a bill without having two thirds of the chamber vote to invoke cloture and thus, end debate. This means that if the filibuster is employed, a super-majority is required to pass the bill in question.

greater number of lawmakers were possibly involved in the debate and construction of the law's provisions. Such legislation is more likely to represent an ideological compromise between ideologically heterogeneous individuals (Mayhew 1974, Patterson and Caldeira 1988, Ragusa 2010). It also constitutes common ground between the varied preferences, principles, and beliefs of a greater number of legislators at its passage.

Getting laws passed with a large cadre of supporters, and as a manifestation of compromise between ideologically heterogeneous lawmakers facilitates durability. It creates laws that are protected in the short term by a large enacting majority and in the long term by the fact that they represent a hard-fought and too rarely achieved compromise between lawmakers who represent their constituencies' diverse interests. These hard-fought compromises are less likely to be targeted for repeal because future coalitions are less likely to be as ideologically distant from the products of a large heterogeneous enacting coalition, as they are from a small homogenous enacting coalition. This observation leads to a specific prediction regarding the effect of the size of enacting coalitions on the durability of federal provisions of law.

Hypothesis 9: *Provisions within laws that garner a larger proportion of Congress' final passage vote will be more durable.*

Partisan Enacting Majorities

Partisan enacting majorities share some of the same disadvantages for legislative durability that small enacting majorities have, but are distinguished by being composed strictly of members of one political party. An enacting coalition comprised of members from only one party faces two problems. First, these coalitions tend never to be very large, the disadvantages of which were discussed above, and second, they manifest only one

party's view of the role of government. Legislation that is supported by one party and represents only one ideological philosophy cannot claim to be the result of a compromise between the divergent interests that have characterized the dominant political parties in the United States, especially in the contemporary era (McCarty, Poole and Rosenthal 2006, Theriault 2008, Theriault 2013).

In the current polarized era, members have less experience finding common ground in lawmaking and are conditioned to the conflictual politics by which they live, whether they are in the minority or the majority party (Mann and Ornstein 2006, Sinclair 2012, Theriault 2013). A particularly vigorous majority, especially during a period of unified government, may be able to pass many of their preferred policies. However, such freedom faces consequences when party control inevitably changes hands and the former majority party's agenda is laid open to efforts to dismantle their legacy.

When control of either or both branches of Congress changes, the newly empowered party is understandably anxious to see their policies considered and, hopefully, enacted. The longer they have been out of power, the more urgent and non-negotiable this aspiration may become. For forty years, control of the legislative branch eluded Republicans. The elections of 1994 ushered out this longstanding pattern of Democratic majorities, after which Republicans enjoyed majorities in both the House and Senate. They used this opportunity to vigorously campaign for the passage of a set of sweeping reforms aimed at reducing the size of government, promoting lower taxes and reforming welfare. They dubbed it, "The Contract with America."

The Contract with America specified ten bills that Republicans promised to bring to the floor for debate and a vote. One of which was the Personal Responsibility Act (H.R. 4), which aimed to reduce welfare benefits for teenage mothers, introduce work requirements for welfare recipients, and to suspend the professional licenses of people who

failed to pay child support, among other provisions. The Senate passed the bill with all the Republican and a spare few Democratic votes. In the House, not a single Democrat voted for it.

The House is unique among our governing institutions because it was originally conceived as the only national institution with members elected directly by the people. The partisan vote on the Personal Responsibility Act revealed the degree to which the people's chamber, the body closest and most accountable to the will of the citizens, was divided on its content. In the speech that would launch his first campaign for political office, Abraham Lincoln shrewdly observed that "A house divided against itself cannot stand." I would add to this that a house divided against itself cannot create law that will stand. President Clinton vetoed the measure.

Because laws that are enacted on party-line votes only draw support from members of one political party they do not represent a substantive compromise, they represent a "house divided against itself." Additionally, they boast a smaller and more partisan cadre of supporters who are less able to protect the law against repeal or omission when control of Congress changes hands.

The Role of Restrictive Rules

Laws that are passed under rules that limit debate and amendments deliberately deny members of Congress, especially minority members, the opportunity to have their preferences realized in the legislative process. This has the effect of making substantive compromises less likely, attracting fewer and less diverse supporters, and leads to less durable policy. Dion and Huber (1996, p. 43) argue that party leaders can avoid compromising with members of the minority by employing restrictive rules that "facilitate

non-centrist policy outcomes." Similarly, Rohde (1991), Aldrich (1995), and Aldrich and Rohde (2000) argue that cohesive majority parties allow party leaders to skew policies away from the chamber median and toward the majority party median.

Special rules limit the amount of time allocated for general debate and constrain the type and number of amendments that can be made to the legislation in question, thereby limiting who has input on the content of the law (see Binder 2012 or Oleszek 2014 for exposition on special rules). Special rules are crafted by the House Rules Committee, a body often seen as a creature of the Speaker. Rules are a means to control the scheduling of and consideration of legislation, and to shelter the majority party's legislative priorities from the incursion of the minority's preferences. Cox and McCubbins (2002, 2005) even argue that the majority party uses negative agenda power, or gatekeeping, as a further means to avoid the pivotal median legislator's influence. In their most nefarious application, rules are the weapons by which the majority attempts to dominate the minority. Former Speaker Jim Wright, D-Texas (1987-1989) says:

> The Rules Committee is an agent of the leadership. It is what distinguishes us from the Senate, where the rules deliberately favor those who would delay. The rules of the House, if one understands how to employ them, permit a majority to work its will on legislation rather than allow it to be bottled up and stymied (re-quoted from Oleszek 2014).

All rules limit the length of general debate but fall along a spectrum in the number and type of amendments they allow. The three types of basic rules are open, modified and closed. Open rules allow germane amendments to be offered from the floor, as long as they are presented in writing and comply with the 1974 Budget Act and House rules and precedents. Closed rules generally prohibit floor amendments, although exceptions are sometimes made for amendments originating from the reporting committee. Modified open and modified closed rules fall somewhere in between and may have requirements that

amendments be preprinted in the *Congressional Record* or that they modify only particular sections of the bill (Oleszek 2014). The Rules Committee can write seemingly endless variations on these three general rules and a majority in the modern Congress, no matter which party, excels at creating new breeds and combinations thereof to ferry laws through the congressional process that are minimally adulterated by the minority's views. The use of special rules has been steadily increasing. Barbara Sinclair found that by the 111th Congress, all rules were at least somewhat restrictive (2012). Closed rules are the most restrictive and therefore, some argue, the most egregious violations of democratic norms. A House Democrat put it this way:

> In most cases, closed rules say that we as individual Members are willing to allow a small portion of the whole to decide what information we need to consider, what complexities our minds are able to master, and from what alternatives we should choose. Furthermore, many times closed rules indicate either an arrogance on the part of the proponents of a bill or an insecurity about the bill's merits or abilities to stand up against competing ideas (re-quoted from Oleszek 2014, *Congressional Record*, December 15, 1987).

Closed rules may be the most restrictive, but open and modified rules are still deviations from the regular rules of the House. Even if they are deployed under the best of intentions, say to increase efficiency, they still hamper members' ability to realize a compromise on the substance of legislation. The full and open consideration of a piece of legislation on the floor under regular House rules may result in prolonged debate, endless amendments, and the gutting of the original proposal. However, it ensures that every member of Congress has the unrestricted opportunity to express his ideas, beliefs, and preferences on the proposed measure. In short, I argue that it allows for the deliberative process that produces durable policy. "Allowing members to work their will can be more cumbersome, and it's not efficient. But it's more democratic" (Republican member of the Rules Committee, re-quoted from Oleszek 2014, p 163).

Full and open consideration of each law means that Congress will consider fewer laws and enact fewer still. The pay-off for an inclusive and open process is the creation of legislation that can claim the support of a larger coalition of members and a process that, in hindsight, is viewed as fair and just by all. This echoes James Madison, who argued that if all parties feel that justice was served in the procedure, they are more likely to support its product (Weiner 2012). An open rule, allowing anyone to propose amendments to legislation, produces an outcome favored by a more diverse coalition of legislators (Romer and Rosenthal 1978). Forcing a law through to enactment using rules to dominate the minority will produce a backlash when control of Congress changes hands. The form of this backlash could be rhetorical, or more likely, it will manifest as a concerted and deliberate effort to undo the perceived ill-gotten gains of the preceding majority. Abraham Lincoln expressed it well when he said, "Force is all-conquering, but its victories are short-lived."

Given that restrictive rules limit the inclusion of minority preferences, laws that are considered under restrictive rules are less likely to represent a substantive compromise. This leads to a prediction regarding the relationship between the use of restrictive rules and legislative durability.

Hypothesis 10: *Provisions within laws considered under restrictive rules will be less durable than those considered under open rules.*

The Role of Control of Government

The modern Congress has been characterized by not only shifts in which party controls government, but also a resurgence in political polarization as evidenced by the growing ideological distance between the median members of each party (McCarty, Poole

and Rosenthal 2006). In the following sections, I argue that the character of government (unified or divided) and levels of polarization at the time of a law's enactment influence its durability. Specifically, I suggest that provisions within laws that are enacted by divided governments in moderately polarized eras will be more durable than provisions enacted by unified governments in highly polarized eras. Additionally, unified governments face a greater risk of having their enactments dismantled when the opposing party gains unified control of government. In the following sections, I discuss the independent effects of unified governments, divided governments, and polarized political parties on legislative durability. I then discuss the interaction of these contemporaneous political dynamics and their combined effect on the durability of federal provisions.

Unified and Divided Governments

"Power tends to corrupt, and absolute power corrupts absolutely" (John Dalberg-Acton, 1st Baron Acton). The federal government is said to be "unified" when one party has a majority in both chambers of Congress and claims the membership of the current President. Unified government is among the most perilous threats to legislative durability because it unites the dominant party's legislative will with the most efficient tools to achieve their goals, without having to compromise.

Because both chambers and the Executive are controlled by one party, the Executive's power of legislative veto, as prescribed by Article 1, Section 7, Clause 3 of the Constitution, no longer forms an impediment to the majority's legislative will. There is no need to compromise or even bargain with the other side (Cameron 2000). Whereas under divided government, separation of powers effectively affords each party a policy veto, under unified government, this impediment to "progress" is removed (Kriebel 1991,

Cameron 2000). Should its members choose, the majority may now pass legislation by simple partisan majorities, employ their choice of rules and tactics in both chambers, and run down the clock to force hasty votes in the last days of a congress, all without the threat of a presidential veto. Because they are not bound by the threat of a veto they have little incentive to compromise with the minority party.

Under periods of unified government, the minority party is not without recourse to thwart the majority's will. They have, at their disposal, several dilatory tactics to fight the dominance of the majority party's agenda. Chief among these is the filibuster in the Senate (Binder 2012, Oleszek 2014). They can also attempt to insert "poison pill" provisions into legislation during the Senate amendment process (Gutmann and Thompson 2012, Theriault 2013), make motions to recommit, or invoke questions of privilege, among other things (Oleszek 2014). Regardless of which tactic the minority employs, their proximate goal is to thwart the majority before they can enact their agenda. Unfortunately for the minority, these dilatory tactics are no match for a majority party, empowered by unified government, and intent on seeing their legislative will enacted.

Under unified government, compromises are only realized if the majority party decides to seek them and if the minority feels that the majority has made sufficient sacrifices on substance and procedure to warrant one. Except for those laws that are the product of substantive compromise, laws that are created by unified governments have, on average, smaller partisan enacting coalitions and therefore face a greater risk of being repealed or otherwise dismantled when control of government shifts.

While unified governments provide seductive incentives for the majority to force their ideological agenda without having to make the substantive compromises that create durable law, divided governments require some measure of compromise to get anything done. Under divided government, if legislators want to see their agenda enacted, they are

compelled to engage in greater policy deliberation and compromise than they are inclined to under unified government (Austen-Smith and Riker 1987; Heller 1997; Weatherford 1993). Majority parties in divided governments are aware that their policy proposals cannot be too ideologically extreme if they want to see them successfully enacted. Consequently, the legislation passed by divided governments is usually bipartisan (Thorson 1998, Weatherford 1993, Ragusa 2010). Not only are bipartisan policies less likely to engender a backlash when control of Congress changes hands, but bipartisan coalitions are more likely to have a longer-lasting cadre of supporters able to defend the policies they helped enact (Ragusa 2010). Because divided governments encourage compromise, I expect laws enacted during divided governments to be more durable than those enacted during unified governments.

Hypothesis 11: *Provisions within laws enacted during periods of divided government will be more durable.*

Shifts in Control of Government

During unified government, the majority party enjoys the latitude to pass the policies its leaders want without having to compromise. Although the majority may be able enact their legislative agenda in the short-term, in the long-term, their policies run the risk of being gutted when the opposing party gains the same latitude. One of the greatest hazards to a unified government's enactments is a unified government controlled by the opposing party.

Parties enjoy the most latitude to enact policy when they have unified control of government. Symmetrically, parties enjoy the most latitude to repeal and omit policy when they have unified control of government. Since Congress is required to pass a law to repeal

provisions, this means that a majority party will have the most freedom to gut their rival's proposals under unified government. Consequently, provisions enacted when party A controls a unified government are more likely to be repealed or omitted by party B, when party B controls a unified government.

Government regularly vacillates between republican and democratic control. This vacillation is evident in Figure 6. In the last 64 congresses, Democrats have enjoyed unified control of government for a total of 22 congresses, while Republicans have enjoyed the same for 23 congresses. In their analysis of federal programs from 1971 to 2003, Barry, Burden and Howell (2010) find that "the partisan composition of the House and Senate typically changed dramatically within any given fifteen-year period."

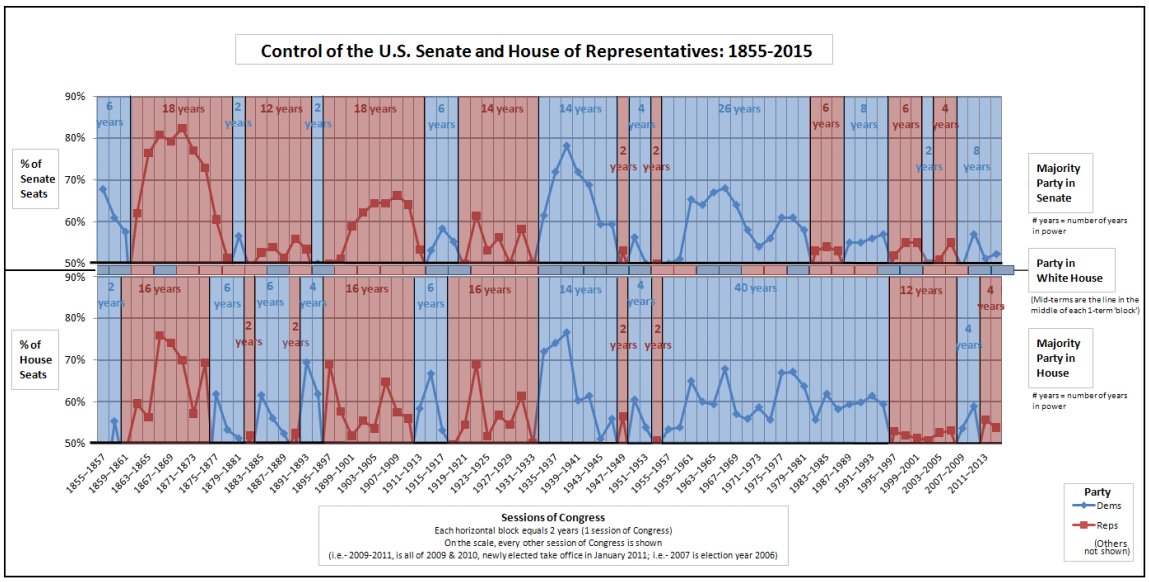


Figure 6: Party Control of the House of Representatives, Senate, and Executive.[9]

It is evident from these historical patterns that "political actors must anticipate that their political rivals may soon control the reins of government" (Pierson 2004). Given that we know a sitting congress is most likely to kill or cut programs from an enacting congress when its partisan composition differs substantially (Maltzman & Shipan 2008; Berry et al 2010), it follows that provisions passed in unified governments will face a higher risk of repeal during periods in which the opposing party gains unified control. Therefore, I anticipate that provisions will face an increasing risk of repeal with each additional congress in which the opposing party enjoys unified control of government.

Hypothesis 12: *Provisions within laws enacted by a unified government face an increasing risk of repeal or omission with each subsequent congress in which the opposing party enjoys unified control of government.*

[9] These data were collected, combined and visualized by ChrisnHouston. Licensed under Licensed under CC BY-SA 3.0 via Wikimedia Commons.

Polarization

Polarization refers to the growing ideological distance between the median members of each party (Poole and Rosenthal 2006). The central finding in the empirical literature on political polarization is that it amplifies gridlock and leads to a less productive Congress (Binder 2003; Bond and Fleisher 1990; McCarty Poole & Rosenthal 2006). Despite scholars' attention to political polarization, we are still relatively ignorant of its effects on the political system. Given its seeming importance in structuring modern politics, I offer a theoretical argument for its independent effect on legislative durability before discussing the effect of its interaction with unified and divided governments. I expect greater polarization at the time of enactment to, on average, increase the durability of federal provisions.

Greater distance between the median Democrat and the median Republican in Congress exacerbates an already slow policy process but engenders the moderate conflict that is necessary to ensure that Congress can effectively debate difficult problems and their solutions (Baumgartner and Jones 1993). This moderate conflict can be thought of as friction that slows the consideration of legislation as it makes its way toward a final passage vote. A good dose of conflict and a slower policy process result in a discussion of a greater range of solutions to problems and greater compromise between lawmakers on enacted legislation. This is likely to result in a better fit between problem and solution for any bills that can run the gauntlet between polarized parties to become law.

Because lawmakers belonging to one party often must compromise with lawmakers belonging to the other party to overcome the gridlock associated with polarization, the resulting policies are often bipartisan, better supported after enactment, and therefore more durable. This leads to a prediction regarding the independent effect of polarization on the durability of federal provisions.

Hypothesis 13: *Provisions within laws enacted during periods of higher polarization will be more durable.*

While polarization may have an independent effect on Congress' ability to enact enduring law, it also has a combined effect with conditions of unified or divided government. Figure 7 plots the dynamic relationship between polarization in Congress and unified and divided governments. Over the last 137 years, there have been several periods of relatively high and low polarization in both the House and Senate (McCarty, Poole and Rosenthal 2006; Theriault 2008), and several switches between periods of unified and divided government.

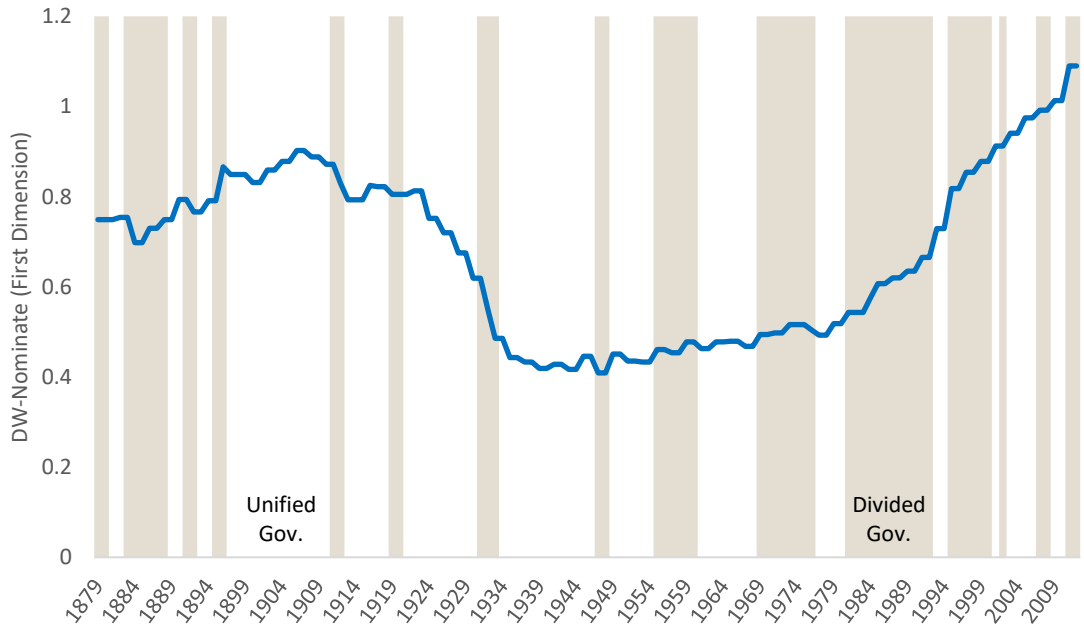


Figure 7: Dynamic Political Context (1879-2012). The degree to which Congress is polarized has varied across periods of unified and divided government. Periods of divided government are shaded.

When interacted, I expect that under conditions of divided government and high polarization that Congress will enact laws whose provisions are the most durable. This is because legislation that has both cleared the hurdle of divided government and garnered a large enough enacting majority during a polarized era to pass represents a compromise between the party in control of the legislature and the party in control of the executive. If laws are bipartisan in this sense, they are less likely to be targeted for repeal or elimination by future coalitions dominated by either party.

If instead, a law is passed during a period of high polarization and unified government, there is no inter-institutional check on the policy aspirations of the party in control of both branches. In a polarized unified government, the party leadership may orchestrate party-line votes, employ restrictive rules, and all manner legislative tactics to stymie the inclusion of minority preferences, without having to worry about an executive veto. Under conditions of unified government, there is already little incentive for the majority party to work with the minority. After several years of high polarization, the majority has not only little incentive to compromise, but also little experience doing so. Consequently, a unified government in a highly polarized era is a tremendous threat to legislative durability because it unites the dominant party's legislative will with the most efficient tools to achieve their goals, without having to compromise.

Because polarized parties in a unified government are unlikely to reach a substantive compromise, they are less likely to enact laws whose provisions are durable. Conversely, because polarized parties in a divided government must work together to overcome the hurdle of divided government and garner a large enough enacting majority during a polarized era to pass legislation, they are more likely to enact legislation that represents a compromise between the major governing parties, which is, therefore, more durable. These observations are resolved into a single hypothesis.

Hypothesis 14: *Provisions within laws enacted by polarized divided governments will be more durable than those enacted by polarized unified governments.*

At this point, I have laid out my core theoretical argument, in which I implicate information, deliberation and compromise as the roots of legislative durability. Since politics is a process that unfolds over time, the value of a substantive compromise born of an entropic information search and serious deliberation consists in not only the quality of legislation such a process produces, but in its inoffensiveness to subsequent coalitions. The only foundation that will hold its place among the shifting sands of politics is a good compromise. In the following chapters, I endeavor to bring to together the best data and methods to test these claims. In the next chapter, I introduce readers to my hand-collected dataset, drawn from the volumes of the United States Code, which I use to investigate provision level durability.

Chapter 4: The United States Code and the Durability of Federal Law

In the chapter that follows, I provide a brief account of the development of the U.S. Code and describe how I use this corpus to track changes in the federal government's passage, repeal and omission of legislation throughout U.S. history. I present a hand-collected dataset, drawn from the Code, which constitutes the only comprehensive record of the legal status of all 268,935 federal provisions in 21,531 laws passed between 1789 and 2012. In addition to tracking the durability of law and identifying the timing of changes to it, I use this data to construct measures of the substantive content of legislation and to visualize the durability of the federal legal corpus over time.

THE UNITED STATES CODE

The U.S. Code is the organized aggregation of all Acts of Congress and the foremost authority on the evolution of our legal corpus over time. Because the Code serves as the record of the general and permanent laws of the United States, it is the premier source for tracking the birth and death of legislation. Federal law in the United States is codified, meaning that it is compiled into a written and organized form. Advocates of codified law systems argue that recording laws provides notice of governments' requirements of citizens and allows individuals to conduct their affairs with certainty regarding their legality. The earliest known codified law system dates back to the Code of Ur-Nammu, King of Ur, written between 2047 and 2030 BCE. This first written legal corpus was followed closely by the promulgation of Lipit-Ishtar's legal code in roughly 1870 BCE and Hammurabi's Code of Babylonian laws in 1754 BCE. Both Lipit-Ishtar and Hammurabi announced in the prologs of their respective codes that these compilations were intended to establish justice among the governed (Steel 1948). In the centuries since Hammurabi had his Code carved into a basalt stele, now residing in the Near Eastern Antiquities wing of the Louvre

Museum, recorded law has served as a contract between the governed and the governing in many societies (Glenn 2010).

Historical Development of a Substantively Organized Code

In the United States, bills that pass both chambers of Congress and are signed by the President are positive laws, meaning that Congress has posited them in accordance with the requirements of enactment set out in the Presentment Clause of the Constitution (Article 1, Section 7, Clause 2). The Government Printing Office records these laws in the volumes of the United States Statutes at Large, where federal statutes are published in the order in which they become law. This chronological compilation represents the written record of positive law in the United States and as such, is definitive legal evidence of the law as intended by Congress.

Given the interconnected nature of federal law and the fact that the U.S. Statutes at Large are arranged chronologically, not by subject area, it is difficult for lawmakers, lawyers, and laypersons to determine the legal status of provisions within particular policy areas by reference only to the Statutes at Large. In the late 1700s and most of the 1800s, practicing lawyers and those interested in verifying the legal status of provisions, needed to read and cross-reference the content of every law that modified a policy area to determine if a key provision stood or had been repealed, omitted or otherwise modified by successive laws or the Supreme Court. A more practical arrangement would have been to arrange provisions according to their policy area and note, at their passage, how they affected existing laws. In response to the acute practical need for a substantively arranged legal code, the earliest efforts to codify federal statutes were undertaken by private publishers (Li et al., 2014). These earliest codifications had no official status but were still

useful resources for those needing to verify the legal status of provisions and the legislative history of particular policy areas.

In 1848, the chairman of the House Judiciary Committee proposed a bill requiring Congress to reorganize provisions of federal law according to the agency responsible for their implementation. The bill's attending report laid out an argument for revising rather than compiling statutes: that these laws may have been "enacted under the pressure of momentary emergency; if not inconsistent, they are obscure; sometimes involved in statutes dissimilar in title and object, and always scattered over different parts of a broad surface, in the numerous hiding places of which they are concealed" (H.R. No 30-671, 1848). Preferably, "enactments defining the duties of a particular office should naturally be so united as to furnish all needful information in one comprehensive body. That which seems to be complete in its enumeration should be so in reality" (H.R. No 30-671, 1848).

In 1866, the chairman's vision for a substantively organized Code began to emerge when Congress created a commission tasked "to revise, simplify, arrange, and consolidate all statutes of the United States, general and permanent in their nature" (14 Stat. 74). In performing this duty, commissioners were instructed by Congress to,

> bring together all statutes and parts of statutes which, from similarity of subject, ought to be brought together, omitting redundant or obsolete enactments, and making such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text; and they shall arrange the same under titles, chapters, and sections, or other suitable divisions and subdivisions, with head-notes briefly expressive of the matter contained in such divisions; also with side-notes, so drawn as to point to the contents of the text, and with references to the original text from which each section is compiled, and to the decisions of the federal courts (14 Stat. 74).

This commission's eventual product was the Revised Statutes of 1874, which was the official and legal codification of all federal law in effect at December 1, 1873. The Revised Statutes repealed or omitted all general acts "embraced in any section" of the

revisions and replaced them as legal evidence of the law (18 Stat. 113). Shortly after Congress enacted the Revised Statutes, they found numerous mistakes and omissions that compelled them to re-enact an amended updated version in 1878, which served as prima facie evidence for those laws enacted between 1873 and 1878. Because of the mistakes and inconsistencies uncovered during this first codification effort, lawmakers were hesitant to trust that they could complete codification without errors that would undermine their original intent.

In 1926, Congress tried to codify the laws they had enacted. Once more they were stymied by the discovery that their proposed text for codification contained errors that were substantial enough to warrant the following preface to the 1926 act: "This Code is the official restatement in convenient form of the general and permanent laws of the United States in force December 7, 1925," but "[n]o new law is enacted and no law repealed. It is prima facie the law. It is presumed to be the law. The presumption is rebuttable by the production of prior standing Acts of Congress at variance with the Code" (44 Stat. V). In hindsight, this preface was warranted, given that Congress later identified 537 errors in the 1926 Revised Statutes, 88 of which were substantive (H. Rept. 70-1706, 1928). Due to these early mistakes and the considerable time and resources it takes to prepare, codify and enact extant statutes into positive law, Congress has not attempted to codify their full lawmaking output since 1926. They have, however, proceeded piecemeal by enacting discrete parts of the U.S. Code into positive law since 1947.

Positive Law Codification in the Modern Code

These early attempts to enact the structure and content of the U.S. Code as positive law were the genesis of the modern organization of the Code into titles and sections, but failed to result in the purely positive law corpus that proponents of codification originally

intended. The Code remains only prima facie evidence of the law, except in those cases where Congress has converted titles of the Code into legal evidence of the law by enacting their full content and structure as positive law. Legal scholars call this process positive law codification. Only acts that Congress passes and the President signs via the process outlined in the Presentment Clause constitute positive statutory law. Therefore, the titles of the U.S. Code that Congress has not enacted in their entirety are considered prima facie evidence of the law and are not considered legal evidence of the law.

For example, Congress has voted on and subsequently enacted the structure and content of Title 49, Transportation. Consequently, Title 49 is positive law of the United States and upon its enactment, appeared in its entirety in the U.S. Statutes at Large. Now, when Congress passes new provisions dealing with transportation, they directly amend Title 49. By contrast, Title 42, The Public Health and Welfare, is a non-positive law title, meaning that Congress never enacted its combined structure and content. Therefore, when Congress passes new provisions dealing with health care, for example, the Office of Law Revision Counsel makes an editorial decision to classify those provisions in the relevant sections of Title 42.

As a result of these efforts, the modern Code is a mix of positive and non-positive law titles. A practical effect of this arrangement is that legal practitioners sometimes find substantive differences between the legal evidence of the law (U.S. Statutes at Large) and prima facie evidence of the law (non-positive law titles of the U.S. Code). For example, in 1993, the Supreme Court ruled in U.S. National Bank of Oregon v. Independent Insurance Agents of America, that section 92 of Title 12, which was thought to have been repealed, was still controlling law. Despite the belief of various trade organizations and insurance agents that the provision was no longer in force, Congress had never repealed the underlying federal statute. Therefore, the relevant provision was and still is controlling

statutory law (508 U.S. 439). Despite relatively rare inconsistencies and mistakes, the U.S. Code has become the primary expression of federal law and serves as sufficient prima facie evidence of the law in most cases.

Positive law codification also provides Congress an opportunity to reexamine all the controlling statutes that contribute to a Code title before they enact it as positive law. This enables Congress to revisit past laws to restate them using a more consistent drafting style, resolve inconsistencies, eliminate duplicate provisions, clarify ambiguity, update policies and even omit or repeal unnecessary or outdated provisions at the time they enact a title into positive law. The process is similar to the revisions that Congress makes when a piece of legislation is about to expire due to the inclusion of a sunset provision.

Adler and Wilkerson demonstrate that when Congress votes to review an expiring piece of legislation, they frequently enact new provisions to go along with other revisions and updates they've made to the expiring policy (2012). As a result, Congress' examination of old law often begets the passage of new law. If revisions triggered by sunset provisions are the predictable and routinized means by which Congress spot cleans particular policies, then positive law codification is the infrequent and irregular means by which Congress deep cleans an entire policy domain. The difference between the two is that when Congress renews expiring legislation they often add new law, whereas when Congress prepares a positive law title for codification they almost exclusively repeal or omit old law. Positive law codification is the legislative world's spring cleaning.

Both of these findings have consequences for our understanding of the power of attention in politics, as it demonstrates that when Congress focusses its attention on a particular policy or particular policy domain, the result can either be the accretion of new law or the subtraction of old law. Attention can drive both outcomes.

The preceding discussion regarding positive law codification suggests that models of legislative durability should include indicators for positive law titles, also called revised titles. Positive law titles face a greater risk of Congress repealing or omitting their provisions because they face greater congressional scrutiny in the debate leading up to their enactment as positive law than do titles that have never been enacted as positive law. Figure 8 shows the significant disparity between the rate of repeal for revised titles (positive law titles) and non-revised titles (non-positive law titles). A provision belonging to a revised title is more than twice as likely not to endure as one belonging to a non-revised title. In fact, almost half of all provisions originally belonging to revised titles have been repealed or omitted by Congress.

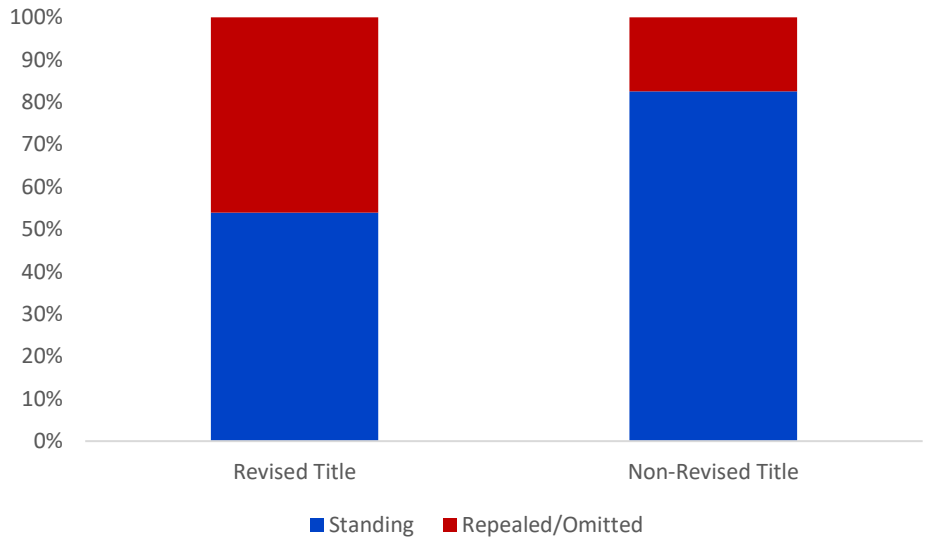


Figure 8: Proportion of Provisions: Revised vs. Unrevised Titles. When Congress undertakes the task of enacting an existing title of the United States Code as a positive law title, they frequently repeal or omit much of the title in the process. The above graph shows the proportion of repealed and omitted provisions in revised titles, which became positive law, and non-revised titles.

We gain some insight into Congress' motivation for repealing particular provisions by differentiating between Congress cleaning house via positive law codification and Congress targeting particular provisions for repeal or omission outside this process. The former suggests the type of legislative house cleaning we associate with good governance (fixing errors, dropping unenforced provisions, etc.), while the later suggests political motivations, namely attempts to align policy with the preferences of the current Congress. In practice, Congress' motivation for repealing a particular provision may mix both the desire to clean the Code and bring policy closer to their preferences. While I cannot identify the motivation that precipitates Congress' choice to repeal or omit a provision, the models I estimate in Chapters 5 and 6 differentiate between provisions that Congress has reviewed because they belong to a positive law title and those they review outside this process.

The Role of the Office of Law Revision Counsel

Since 1974, the Office of Law Revision Counsel (OLRC) has been responsible for codifying and classifying the general and permanent laws of the United States (exclusive of private laws, annual appropriations that are temporary in nature, and nonrecurring reports) into the extant structure of the U.S. Code[10]. Whenever Congress passes and the President signs a new law, the text of the enrolled version of the bill is sent to the OLRC, whereupon they codify (in the case of positive law titles) or classify (in the case of non-positive law titles) the law's various provisions into one or more of the 51 titles of the U.S. Code and make a complete accounting of how its provisions affect existing laws. The full list of OLRC's official functions are recorded pursuant to 2 U.S.C. 285b:

[10] The Government Accountability Office publishes an annual compendium on the "Principles of Federal Appropriations Law," often referred to as the "red book," which specifies in Volume 1, Chapter 2, what language indicates Congress' intent that a provision be part of the general and permanent law of the United States. This chapter refers to words like "hereafter" and "thereafter" as indications that Congress' intent was for the program or policy under discussion to be permanent.

(1) To prepare, and submit to the Committee on the Judiciary one title at a time, a complete compilation, restatement, and revision of the general and permanent laws of the United States which conforms to the understood policy, intent, and purpose of the Congress in the original enactments, with such amendments and corrections as will remove ambiguities, contradictions, and other imperfections both of substance and of form, separately stated, with a view to the enactment of each title as positive law.

(2) To examine periodically all of the public laws enacted by the Congress and submit to the Committee on the Judiciary recommendations for the repeal of obsolete, superfluous, and superseded provisions contained therein.

(3) To prepare and publish periodically a new edition of the United States Code (including those titles which are not yet enacted into positive law as well as those titles which have been so enacted), with annual cumulative supplements reflecting newly enacted laws.

(4) To classify newly enacted provisions of law to their proper positions in the Code where the titles involved have not yet been enacted into positive law.

(5) To prepare and submit periodically such revisions in the titles of the Code which have been enacted into positive law as may be necessary to keep such titles current.

(6) To prepare and publish periodically new editions of the District of Columbia Code, with annual cumulative supplements reflecting newly enacted laws, through publication of the fifth annual cumulative supplement to the 1973 edition of such Code.

(7) To provide the Committee on the Judiciary with such advice and assistance as the committee may request in carrying out its functions with respect to the revision and codification of the Federal statutes.

In addition to preparing titles for the process of positive law codification, recommending repeal of obsolete or superseded provisions, publishing the U.S. and D.C. Codes, classifying and codifying new laws, and providing assistance to the Judiciary Committee, the OLRC also monitors how executive branch agencies implement policy. They regularly make editorial decisions to omit provisions from the Code because federal agencies no longer enforce them, because Congress has cut funding for them or because new laws have superseded or amended them out of existence (OLRC 2014). As discussed

in Chapter 2, statutory provisions that the Supreme Court has struck down or that agencies have omitted as unnecessary or unenforceable, but which Congress has not repealed, are still technically the controlling statutory law of the United States. However, they are most often not treated as such by Congress or relevant federal agencies.[11] Unfortunately, the text of the Code, as prepared by the OLRC, rarely specifies which law resulted in the omission of an extant provision or at what point in time a federal agency stopped enforcing it. For this reason, the Code is an invaluable resource for identifying which provisions the executive branch no longer enforces (omitted), but it cannot usually tell us precisely why or when federal agencies stopped enforcing them.

Although the Code cannot tell us about the timing of omissions, it can tell us about the timing of repeals. The Code provides a complete record of the timing of any and all repeals of provisions that have at one point constituted the general and permanent laws of the United States. Similarly, it contains a complete record of all provisions that Congress repealed when they enacted a title as positive law. In the following section, I describe how I used the United States Code to build a political science dataset that allows me to investigate legislative durability from the founding of our Republic.

BUILDING A POLITICAL SCIENCE DATASET FROM THE UNITED STATES CODE

As of 2012, the U.S. Code contained over 22 million words spread over 51 titles. Such an expansive collection of law requires a sophisticated organizational structure to allow individuals to identify the particular provision(s) that applies to their circumstances. Pursuant to this, the Code is arranged in a nested structure, with clauses within subparagraphs, subparagraphs within paragraphs, paragraphs within subsections, etc., all of which are contained within a title. Figure 9 illustrates this nested structure in section

[11] See Gaddis v U.S. (381 F3d 444), U.S. v Boettcher (780 F2d 435), and Chandler (398 US 74).

162(e)(2)(B)(ii) of Title 26, The Internal Revenue Code. This particular clause denies tax deductions for lobbying and political expenditures except "in the case of any legislation of any local council or similar governing body in direct connection with communication of information between the taxpayer and an organization of which the taxpayer is a member with respect to any such legislation or proposed legislation which is of direct interest to the taxpayer and to such organization" (**26 U.S.C.** § 162(e)(2)(B)(ii)).

Title 26 — Internal Revenue Code

- Subtitle A: Income Taxes
  - Chapter 1: Normal Taxes and Surtaxes
    - Subchapter B: Computation of Taxable Income
      - Part VI: Itemized Deductions for Individuals and Corporations
        - Section 162: Trade or business expenses
          - Subsection (e): Denial of deduction for certain lobbying and political expenditures
            - Paragraph (2) Exception for local legislation
              - Sub-paragraph (B)
                - Clause (ii)

Figure 9: Example of U.S.C. Organization: (26 U.S.C. § 162(e)(2)(B)(ii)). A full record of the organization of each Code Title can be found in the Office of Law Revisions online version of the United States Code.

This nested structure is characteristic of all titles within the Code. When Congress passes a new law, its provisions are codified or classified into one or more of the Code's 51 subject titles and assigned U.S. Code citations based on where they appear in each title. The OLRC publishes several tables that summarize information about the classification and codification of public laws to the United States Code. Table III, the most central of

these to my analysis, lists every provision of every public law that the OLRC has classified or codified to the Code in whole or in part at any time. On average, each provision inserts two-thirds of a page of text into the Code.[12] Table III identifies provisions by public law number, enacting Congress, date signed into law, U.S. Statutes at Large volume, chapter, section and page number, and the U.S. Code title and section into which the provision was classified or codified. Importantly, it also lists the current status of each provision: standing, repealed, omitted, part of the Revised Statutes 1878, or part of a title that was enacted into positive law. For those provisions that Congress enacted as part of a positive law title, or included in the Revised Statutes or 1878, their current status (standing, repealed or omitted) is recorded in Tables I and II, respectively. Consequently, to construct a database that includes the accurate, current status of all provisions included in legislation, all three tables must be combined and appropriately related.

Unfortunately, the OLRC relies on proprietary software to create Tables I-III for the U.S. Code and is, therefore, only able to release PDF versions of these tables to interested scholars. To transform text into spreadsheet data, I relied on a PDF converter and repaired many thousands of observations that failed to transfer accurately across the tables during the conversion from raw text to the spreadsheet. Tables I and II included 9,342 and 19,654 provisions, respectively, which I related by hand to the 268,935 provisions in Table III. By combining all three tables and relating their content, I built a single database that connected the necessary information to uncover the current status of all 268,935 provisions of federal law, enacted between June 1, 1789, and January 15, 2013.

[12] The average length of a provision of federal law is .67 pages. This is based on the number of pages each provision occupies in the volumes of the U.S. Statutes at Large for laws enacted between 1789 and 2012.

Identifying Repeals

Over 227 years, Congress enacted 21,531 laws, containing 268,935 provisions that were codified or classified as part of general and permanent law of the United States. Of these, 216,450 are still standing. Congress has repealed 37,790 provisions and omitted 14,862 provisions (see Figure 1 in Chapter 1). These figures relate the raw magnitude of the durability of federal laws and the ephemeral effect of repeals and omissions on the legal corpus, but do not take into account the timing of these events. Since repeals require an Act of Congress to "strike" provisions from federal law, I was able to use the database I created, in conjunction with the text of the U.S. Code, to learn the exact date Congress repealed each provision.

For the 37,790 repeals in my database, I used their U.S. Code citation to identify the title and section where the OLRC originally classified them. After Congress has repealed a provision, the OLRC places a note somewhere in the Code that summarizes the content of the repealed provision and includes a reference to the repealing law's public law number (if applicable)[13], Statutes at Large citation and date of enactment. The placement of these notes is often inconsistent among and within titles. Most often I found them within the body of the text of the section into which the original provision was codified, sometimes under a heading titled, "Prior Provisions." I also found these notes in the front matter of the chapter or section immediately preceding or following the section into which the original provision was codified. If I was unable to find the note describing the repeal I was looking for, I searched surrounding chapters and sections of the Code until I exhausted all the possible places such a note could appear. Through a careful reading of the Code, I

[13] Public law numbers have been used to identify legislation since 1957. Before this, they were identified by their enactment date and the volume and page number they occupied in the U.S. Statutes at Large.

recovered and recorded the repealing law, and consequently the date upon which Congress repealed 37,321 of the 37,790 provisions in my database.[14]

VISUALIZING STATUTORY LAW

Because I have collected data on what Congress has enacted as well as what it and the other branches have repealed or omitted, my database serves as a measure of both the positive and negative governing power for all three branches. In the following sections, I present a series of graphs that shows how these powers have shaped the evolution of our statutory corpus. In addition to repeals and omission, I include a measure of provision level policy content to demonstrate disparities in the durability of provisions from different policy domains. The result is an evolutionary legal structure, visualized in the following figures, that includes all general and permanent provisions of statutory law and takes into account those provisions which have been repealed or omitted by the Legislative, Executive or Judicial branches and are therefore no longer part of the legal corpus. As such, it is the most accurate rendering of the output of U.S. federal government ever collected or visualized.

[14] Where the relevant U.S. Code note indicated that there were two repealing laws for the same provision, both are noted in my database, however the date used in the analysis is associated with the first instance of repeal.

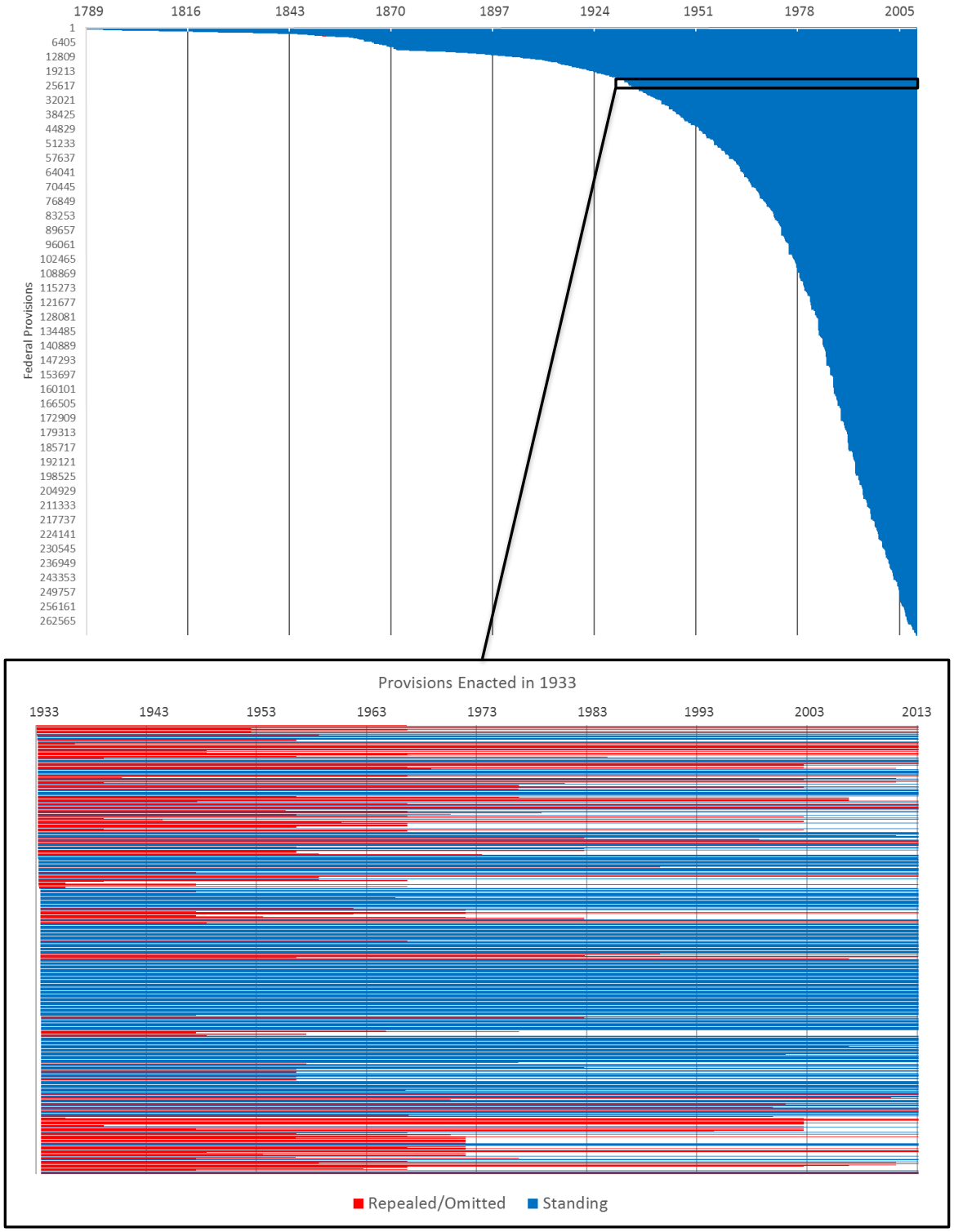


Figure 10: Duration of Federal Provisions (1st-112th Congress, 1789-2013).

For the first time, it is possible to visualize the durability of our legal corpus. The top graph in Figure 10 shows the durability of every provision of federal law passed since the first Congress. All 268,935 provisions are recorded as lines on the Y-axis. The enactment date of each provision is recorded on the X-axis. Durable provisions are colored blue. Repealed or omitted provisions are colored red. The density of lines representing each provision in the top graph, render it impossible to visually observe the durability of individual provisions. The bottom graph in Figure 10 remedies this by focusing only on those provisions enacted in 1933. Most of the 590 provisions Congress enacted in 1933 were part of President Roosevelt's New Deal legislation, including the Banking Act of 1933 (discussed extensively in Chapter 1), the Economy Act, the Civilian Conservation Corps, the Federal Emergency Relief Act, the Agricultural Adjustment Act, the Tennessee Valley Authority, the National Industrial Recovery Act and the Federal Securities Act. It would require an additional 258 pages of this dissertation to display the durability of all provisions at the level of detail shown in the graph for 1933.

Because visualizing the durability of all provisions is unfeasible, I have calculated descriptive statistics to give readers a sense of their distribution. Over the entire dataset, 80 percent of all provisions are enduring, meaning that they are as much the law of the land now as they were when the President signed them into law. Congress has repealed 14 percent of all provisions, and six percent are no longer enforced (omitted). Of those provisions that Congress has repealed, the shortest-lived provision lasted 0 days, and the longest-lived provision lasted 227 years.

The shortest-lived legal provision in U.S. history is an effective date in the Patient Protection and Affordable Care Act of 2010 (PPACA), which Congress repealed on the same day they enacted the PPACA. In this very rare instance, the same law that passed a provision repealed it. The original effective date for section 2551 of the Act, dealing with

Medicaid disproportionate share hospital payments, was identified on page 314 as October 1, 2011. Over 600 pages later, the effective date for this section was repealed (p. 922) and no new effective date replaced it. See the relevant note below.

> Pub. L. 111–148, title II, §2551(b), Mar. 23, 2010, 124 Stat. 314 , which provided that the amendments made by subsection (a), amending this section, were effective on Oct. 1, 2011, was repealed by Pub. L. 111–148, title X, §10201(f), Mar. 23, 2010, 124 Stat. 922.

By contrast, the longest-lived provision in our legal corpus was enacted at the first meeting of our Congress on June 1, 1789 and provided that, "[t]he oath of office shall be administered by the President of the Senate to each Senator who shall be elected, previous to his taking his seat" (1 U.S.C. 21). The durability of the reminder of the provisions enacted by Congress lay somewhere between these two extremes (see Figure 11). Thus, over the course of U.S. history, the average time between the enactment of a provision and its repeal is precisely 38 years and 30 days.

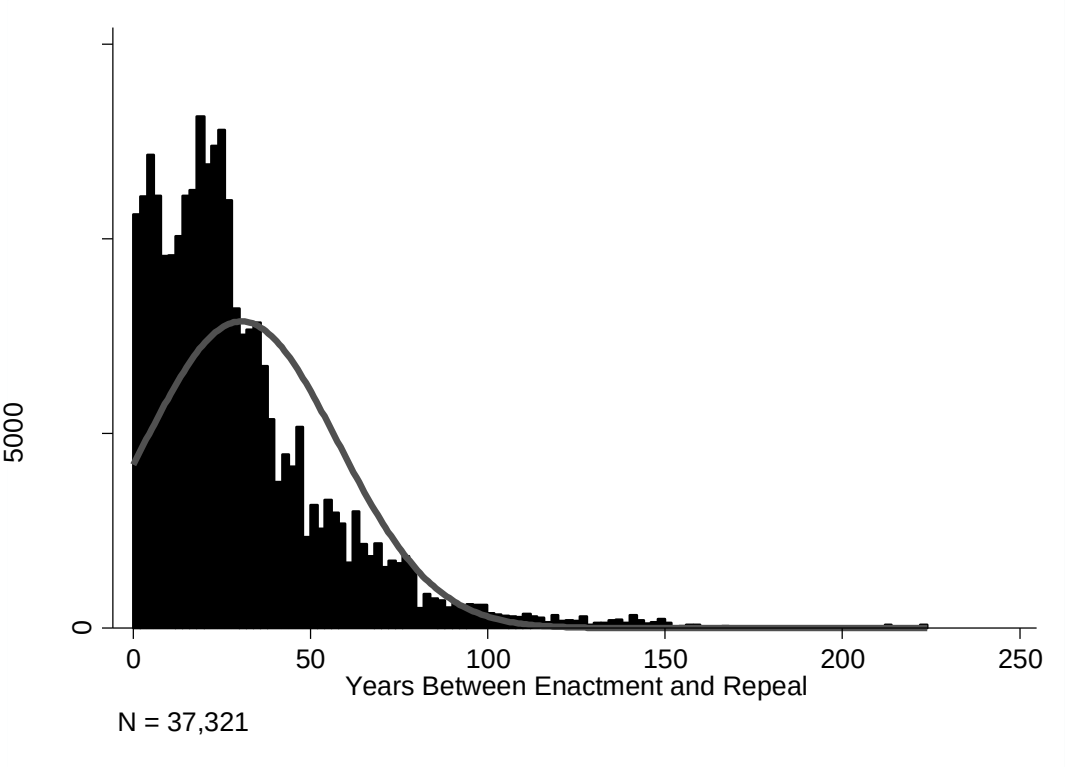


Figure 11: Histogram of the number of years between enactment and repeal for all provisions repealed between 1789 and 2012.

Coding the United States Code

Knowing the longest, shortest and average time between enactment and repeal provides a baseline for studying durability. However, these descriptive statistics tell us nothing about why certain provisions are more or less likely to endure. To this point, the preceding discussion has not highlighted systematic differences between provisions, although they differ in many important ways, including their policy content.

To identify the policy focus of federal law, I coded each provision using the Policy Agendas Project coding scheme.[15] The Policy Agendas Project (PAP) collects and

[15] The coding scheme used here was originally developed by Frank R. Baumgartner and Bryan D. Jones, with the support of National Science Foundation grant numbers SBR 9320922 and 0111611, and is distributed through the Department of Government at the University of Texas at Austin. Neither NSF nor the original collectors of the data bear any responsibility for the analysis reported here.

organizes data from various archived sources to trace changes in the national policy agenda and public policy outcomes since the Second World War. It classifies policy activities into a single, universal and consistent coding scheme consisting of 20 major topics and over 200 subtopics. Baumgartner and Jones designed the PAP codes to be descriptive of policy outputs back to the early post-war period in the United States (Baumgartner et al., 1998), making it a particularly effective coding scheme for identifying and classifying policy topics in provisions of federal law. By assigning PAP topic codes to all federal provisions, the resulting dataset joins an array of others hosted by the Policy Agendas Project including Congressional hearings, Supreme Court cases, and Executive orders, which are coded according to the same proven and reliable scheme.

Because the OLRC classifies or codifies each provision into the substantive title that best fits its policy content, I was able to use the organization of the Code to identify the topic focus of all 268,935 provisions in the dataset. For example, the OLRC codifies provisions dealing with the regulation and maintenance of railroads into Title 45, "Railroads," and provisions dealing with copyright law into Title 17, "Copyrights." The OLRC sorts and codifies provisions into substantively different titles of the Code even if the provisions were enacted as part of the same law. For example, if Congress passes a law dealing with both railroads and copyrights, the OLRC codifies provisions dealing with railroads into Title 45 and provisions dealing with copyrights into Title 17. Figure 12 shows the proportion of provisions classified into each of the 51 titles of the Code.

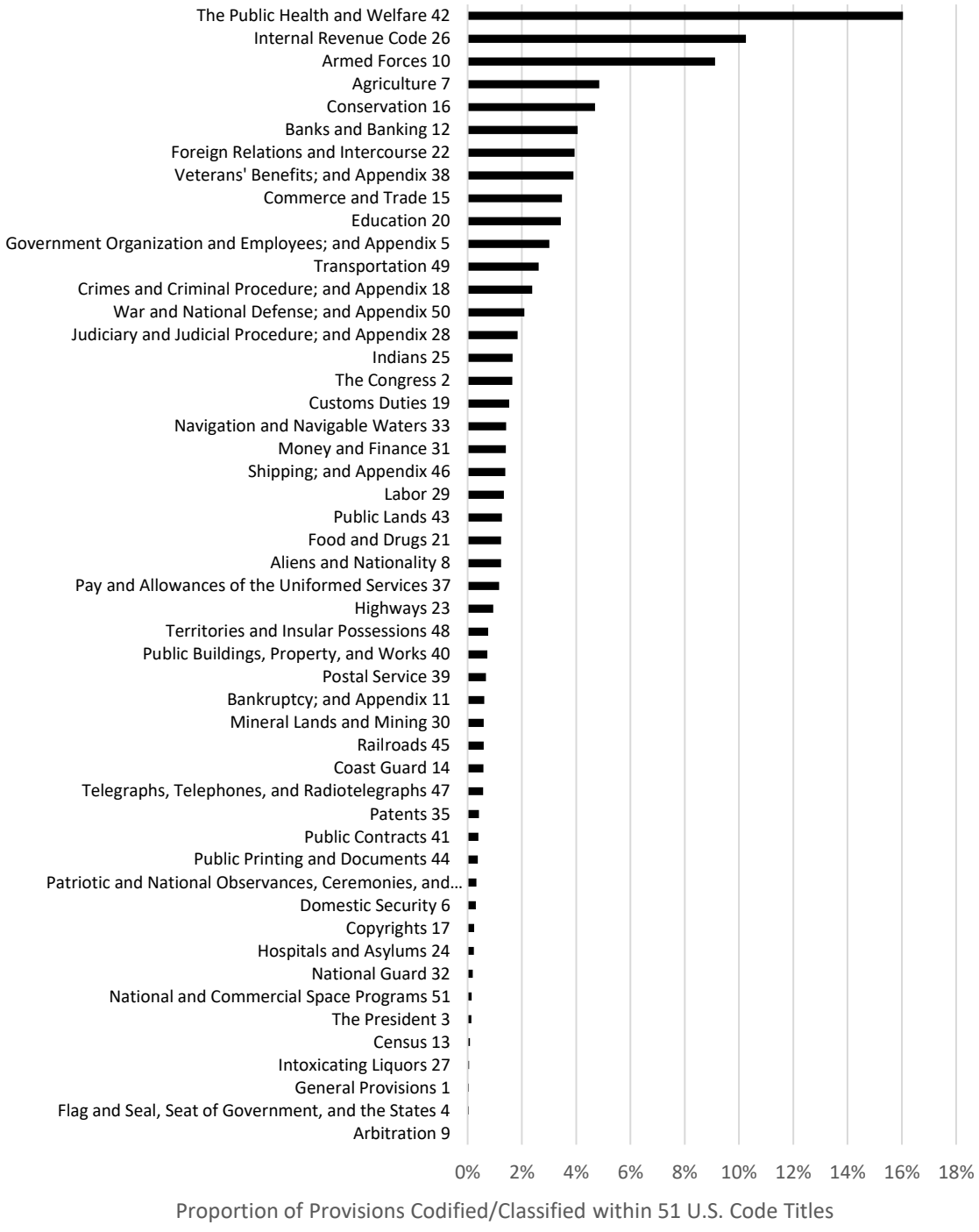


Figure 12: Proportion of Provisions Codified or Classified within 51 Titles of the United States Code from 1789 to 2012.

U.S. Code titles vary in size for two reasons. First, some titles are larger than others because Congress has simply passed more legislation in that policy area. Second, some titles are larger because their scope (the breadth of policy topics they contain) is broad. The largest title is Public Health and Welfare (Title 42), followed by the Internal Revenue Code (Title 26) and the Armed Forces (Title 10). The smallest titles are those dealing with international arbitration (Title 9) and symbols of the federal government (Title 4). While most titles are relatively small and represent no more than two percent of the government's policy output, some are disproportionally large and represent over ten percent of government's output. The discrepancy in the size of the titles such as the Census (Title 13), which represents less than one percent of legislative output, and Public Health and Welfare (Title 42), which represents over sixteen percent of legislative output, indicates that these two titles have widely different scopes. The ten chapters within Title 13 deal exclusively with the administration of the constitutionally mandated census that the federal government undertakes every ten years and addresses no other policy topics. Whereas, the 159 chapters in Title 42 deal with many different unrelated policies such as, old age insurance (Chapter 7), school lunch programs (Chapter 13), air pollution control (Chapter 15B), civil rights (Chapter 21), solid waste disposal (Chapter 39), national housing initiatives (Chapter 49), disaster relief (Chapter 58), treatment programs for drug and alcohol abuse (Chapter 60), and even recently enacted provisions of the patient protection and affordable health care act (Chapter 157). Using the US title into which the OLRC codifies or classifies a provision as the only measure of its policy content is a reliable heuristic in the case of provisions classified in Title 13, but an unreliable estimate of policy content for those provisions classified in Title 42.

Given disparities in the scope of titles, I adopted a more nuanced scheme to measure the policy content of provisions. Instead of assigning the same PAP topic code to all of the

provisions within a single title, I assigned PAP topic codes to provisions based on the chapter in which they appear. Chapters are one step below titles in the nested structure of the U.S. Code. They cover more narrow topics and the OLRC names them to identify the policy content of their constituent provisions. To "code" the provisions contained in the US Code into PAP subtopics, I assigned each chapter of the U.S. Code, and every provision within it, a PAP subtopic code based on the given name of the chapter. For example, I assigned Chapter 39, within Title 42, "Solid Waste Disposal," PAP code 703, which is referred to in the PAP Codebook as "Waste Disposal." Because Baumgartner and Jones designed the PAP codes to be descriptive of policy outputs back to the early post-war period (Baumgartner et al., 1998), I find substantial overlap between the given names of chapters in the U.S. Code and PAP topic codes going back as far as the late 1700s. Out of 200 PAP subtopics, 184 applied to chapters of the U.S. Code.

The net effect of coding the Code using PAP subtopics at the level of its chapters is that it produces a fine-grained and accurate measure of the policy content of individual provisions of law. I used this measure to build indicators for determinates of durability like omnibus legislation and the timing of government intrusion into particular policy areas, both of which I discuss in greater detail, along with the models that employ them, in Chapters 5 and 6.

An ancillary benefit I derive by assigning PAP subtopic codes at the level of provisions is that I can measure the total legislative output of Congress in finer detail than has been tenable before. Prior efforts to measure legislative output have relied on coding whole laws (Mayhew 1991) or more recently, the titles within laws (Whyman and Jones 2012). None has delved deeply enough into the law to record the policy content of individual provisions. Given Congress' increased reliance on omnibus measures to pass

policy, gross measures of the substantive content of whole laws fall well short of capturing the full breadth and detail of the policy content in Congress' legislative output.

To illustrate the differences between coding whole laws versus individual provisions, I compare the proportion of PAP public laws coded by major topic area with the proportion of provisions coded by major topic area for the postwar period in Figure 13. The rankings that emerge differ if I code whole laws as the unit of analysis than if I code individual provisions. If I measure legislative output using the policy codes assigned to whole laws, Government Operations appears to be the largest category, followed closely by Public Lands and Water Management. These categories dwarf all others and give the impression that legislative output is highly skewed toward these functions. If instead, I assign topic codes to individual provisions, a very different picture emerges. By coding individual provisions instead of whole laws according to the PAP coding scheme, I find that legislative output is far more balanced between the twenty major topic categories. The top categories, Defense, Government Operations, and Macroeconomics, account for just over 35 percent of total legislative output, while the middle six categories, Social Welfare, Banking, Public Lands and Water Management, Transportation, Health, Agriculture and Law Crime and Family Issues, account for just over 40 percent of total legislative output. The remaining 25 percent of legislative output is split between categories like Housing, Energy, and Immigration, among others. By assigning topic codes at the level of individual provisions, I produce a far more accurate measures of Congress' legislative output. Doing so enables me to test the effect of policy content on individual provisions' durability.

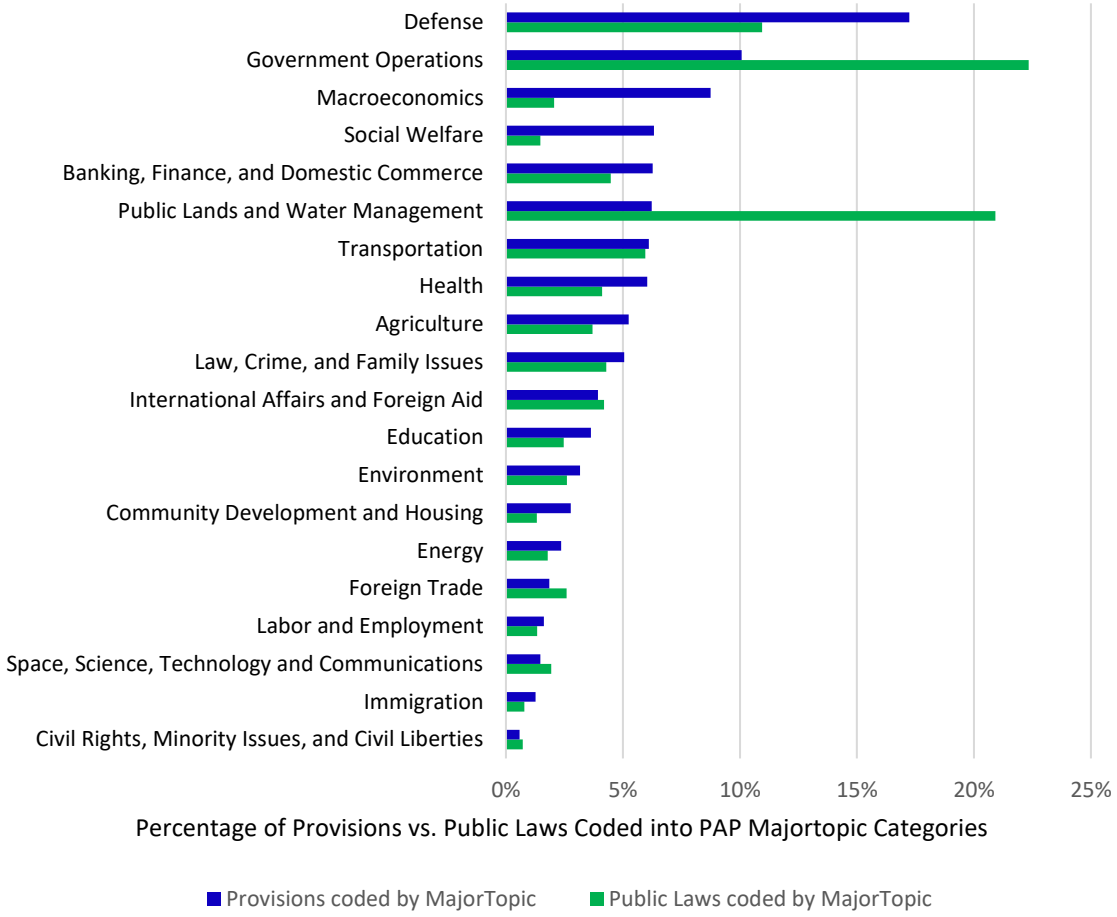


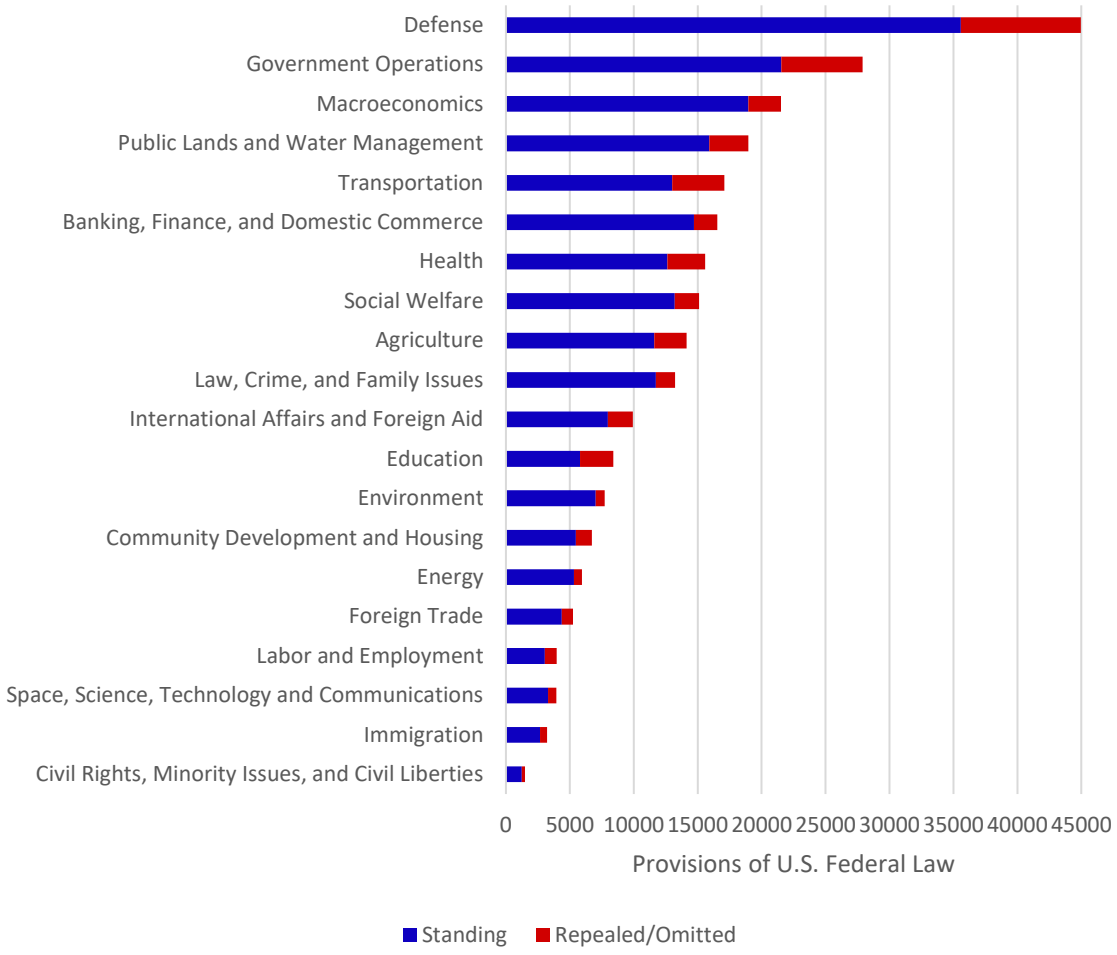
Figure 13: Comparison between Public Laws vs. Provisions Coded according to PAP topic codes (1948-2011).[16]

Durability by Policy Area

A direct benefit of coding provisions by PAP topic codes is that it allows me to group provisions by policy area, revealing that some policy topics are more durable than others. Figures 14 and 15 show the proportion of repealed/omitted provisions for each PAP major topic code and PAP subtopic code, respectively. Although some policy topics

[16] The data used here were originally collected by Frank R. Baumgartner and Bryan D. Jones, with the support of National Science Foundation grant numbers SBR 9320922 and 0111611, and were distributed through the Department of Government at the University of Texas at Austin. Neither NSF nor the original collectors of the data bear any responsibility for the analysis reported here.

represent a greater proportion of the aggregate output of the lawmaking process, they are not necessarily the most likely to be repealed or omitted. For example, at the major topic level, provisions dealing with macroeconomics are more likely to endure than those dealing with education. Yet, macroeconomics represents a greater proportion of the total provisions enacted since 1789. The same holds true for provisions dealing with banking and finance, which are more numerous, but also more durable, than those dealing with agriculture or education. At the subtopic level, provisions dealing with taxes are the most numerous but are not as likely to be repealed or omitted as provisions dealing with education issues, mental illness, and ethnic and minority discrimination, for example.



rFigure 14: Proportion of Standing, Repealed and Omitted Provisions by PAP Major Topic (1789-2012). The oldest functions of government occupy the largest proportion of the United States Code, although they are not necessarily the most likely to be repealed or omitted.

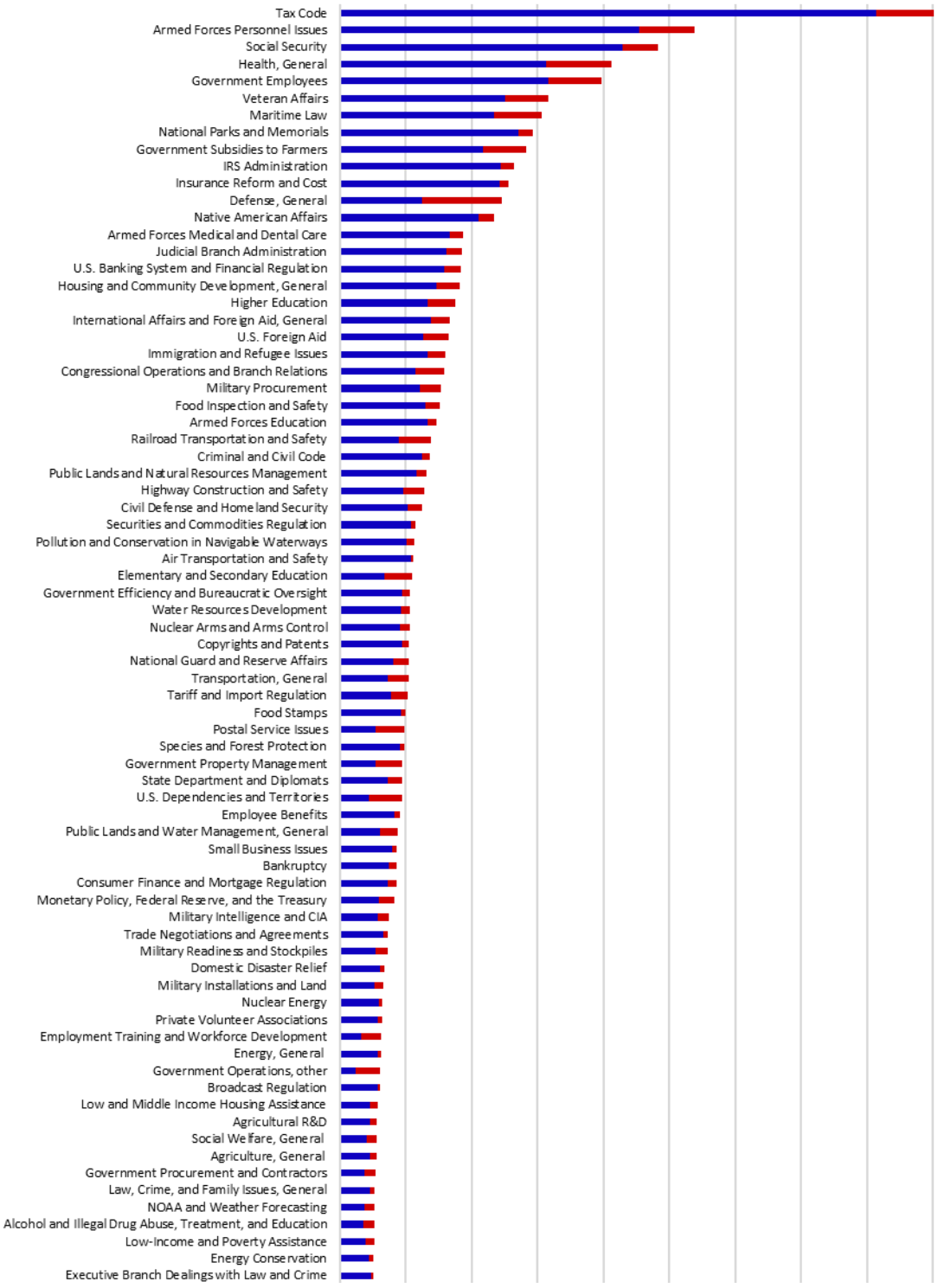

Tax Code
Armed Forces Personnel Issues
Social Security
Health, General
Government Employees
Veteran Affairs
Maritime Law
National Parks and Memorials
Government Subsidies to Farmers
IRS Administration
Insurance Reform and Cost
Defense, General
Native American Affairs
Armed Forces Medical and Dental Care
Judicial Branch Administration
U.S. Banking System and Financial Regulation
Housing and Community Development, General
Higher Education
International Affairs and Foreign Aid, General
U.S. Foreign Aid
Immigration and Refugee Issues
Congressional Operations and Branch Relations
Military Procurement
Food Inspection and Safety
Armed Forces Education
Railroad Transportation and Safety
Criminal and Civil Code
Public Lands and Natural Resources Management
Highway Construction and Safety
Civil Defense and Homeland Security
Securities and Commodities Regulation
Pollution and Conservation in Navigable Waterways
Air Transportation and Safety
Elementary and Secondary Education
Government Efficiency and Bureaucratic Oversight
Water Resources Development
Nuclear Arms and Arms Control
Copyrights and Patents
National Guard and Reserve Affairs
Transportation, General
Tariff and Import Regulation
Food Stamps
Postal Service Issues
Species and Forest Protection
Government Property Management
State Department and Diplomats
U.S. Dependencies and Territories
Employee Benefits
Public Lands and Water Management, General
Small Business Issues
Bankruptcy
Consumer Finance and Mortgage Regulation
Monetary Policy, Federal Reserve, and the Treasury
Military Intelligence and CIA
Trade Negotiations and Agreements
Military Readiness and Stockpiles
Domestic Disaster Relief
Military Installations and Land
Nuclear Energy
Private Volunteer Associations
Employment Training and Workforce Development
Energy, General
Government Operations, other
Broadcast Regulation
Low and Middle Income Housing Assistance
Agricultural R&D
Social Welfare, General
Agriculture, General
Government Procurement and Contractors
Law, Crime, and Family Issues, General
NOAA and Weather Forecasting
Alcohol and Illegal Drug Abuse, Treatment, and Education
Low-Income and Poverty Assistance
Energy Conservation
Executive Branch Dealings with Law and Crime

Figure 15

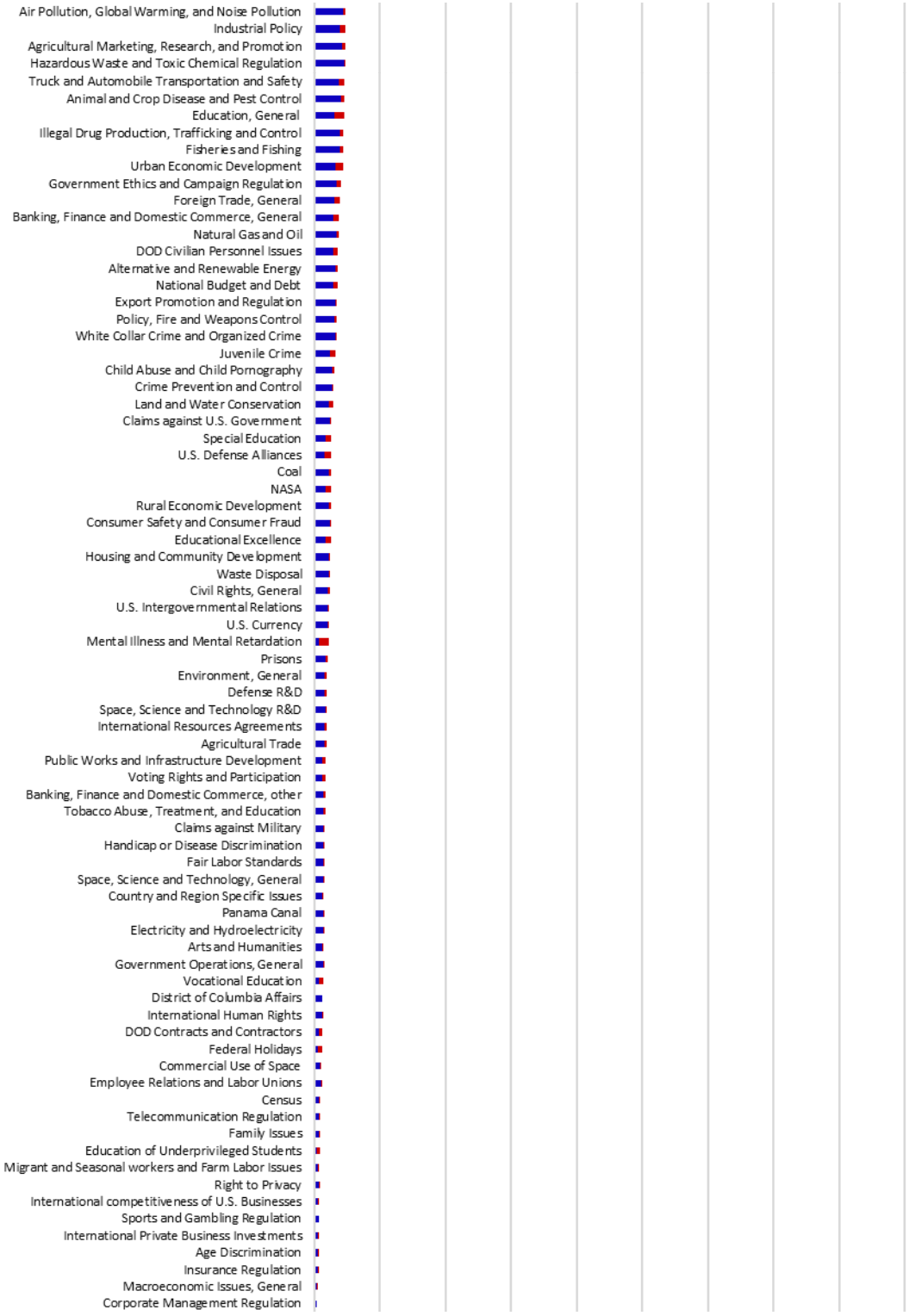

Air Pollution, Global Warming, and Noise Pollution
Industrial Policy
Agricultural Marketing, Research, and Promotion
Hazardous Waste and Toxic Chemical Regulation
Truck and Automobile Transportation and Safety
Animal and Crop Disease and Pest Control
Education, General
Illegal Drug Production, Trafficking and Control
Fisheries and Fishing
Urban Economic Development
Government Ethics and Campaign Regulation
Foreign Trade, General
Banking, Finance and Domestic Commerce, General
Natural Gas and Oil
DOD Civilian Personnel Issues
Alternative and Renewable Energy
National Budget and Debt
Export Promotion and Regulation
Policy, Fire and Weapons Control
White Collar Crime and Organized Crime
Juvenile Crime
Child Abuse and Child Pornography
Crime Prevention and Control
Land and Water Conservation
Claims against U.S. Government
Special Education
U.S. Defense Alliances
Coal
NASA
Rural Economic Development
Consumer Safety and Consumer Fraud
Educational Excellence
Housing and Community Development
Waste Disposal
Civil Rights, General
U.S. Intergovernmental Relations
U.S. Currency
Mental Illness and Mental Retardation
Prisons
Environment, General
Defense R&D
Space, Science and Technology R&D
International Resources Agreements
Agricultural Trade
Public Works and Infrastructure Development
Voting Rights and Participation
Banking, Finance and Domestic Commerce, other
Tobacco Abuse, Treatment, and Education
Claims against Military
Handicap or Disease Discrimination
Fair Labor Standards
Space, Science and Technology, General
Country and Region Specific Issues
Panama Canal
Electricity and Hydroelectricity
Arts and Humanities
Government Operations, General
Vocational Education
District of Columbia Affairs
International Human Rights
DOD Contracts and Contractors
Federal Holidays
Commercial Use of Space
Employee Relations and Labor Unions
Census
Telecommunication Regulation
Family Issues
Education of Underprivileged Students
Migrant and Seasonal workers and Farm Labor Issues
Right to Privacy
International competitiveness of U.S. Businesses
Sports and Gambling Regulation
International Private Business Investments
Age Discrimination
Insurance Regulation
Macroeconomic Issues, General
Corporate Management Regulation

Figure 15

Figure 15: Proportion of Standing, Repealed and Omitted Provisions by PAP Subtopic (1789-2012).

Correspondingly, Figures 16 and 17 show the ranking of the proportion of provisions in each policy area that Congress has either repealed or omitted without reference to how many standing provisions of law there are in each policy area. In the case of major topics, provisions dealing with energy, the environment, banking and domestic commerce, law and crime issues and macroeconomics are among the most durable. Whereas, provisions dealing with education, transportation, labor and employment, government operations and defense are among the least durable. Concerning subtopics, provisions dealing with topics in education research and development, mental health, defense, miscellaneous government operations, U.S. Territories, employment training, workforce development, postal service issues, elementary and secondary education, etc.,

are the least durable. While provisions dealing with direct war issues, terrorism, freedom of speech and religion, and governance for the District of Columbia, etc., are among the most durable.

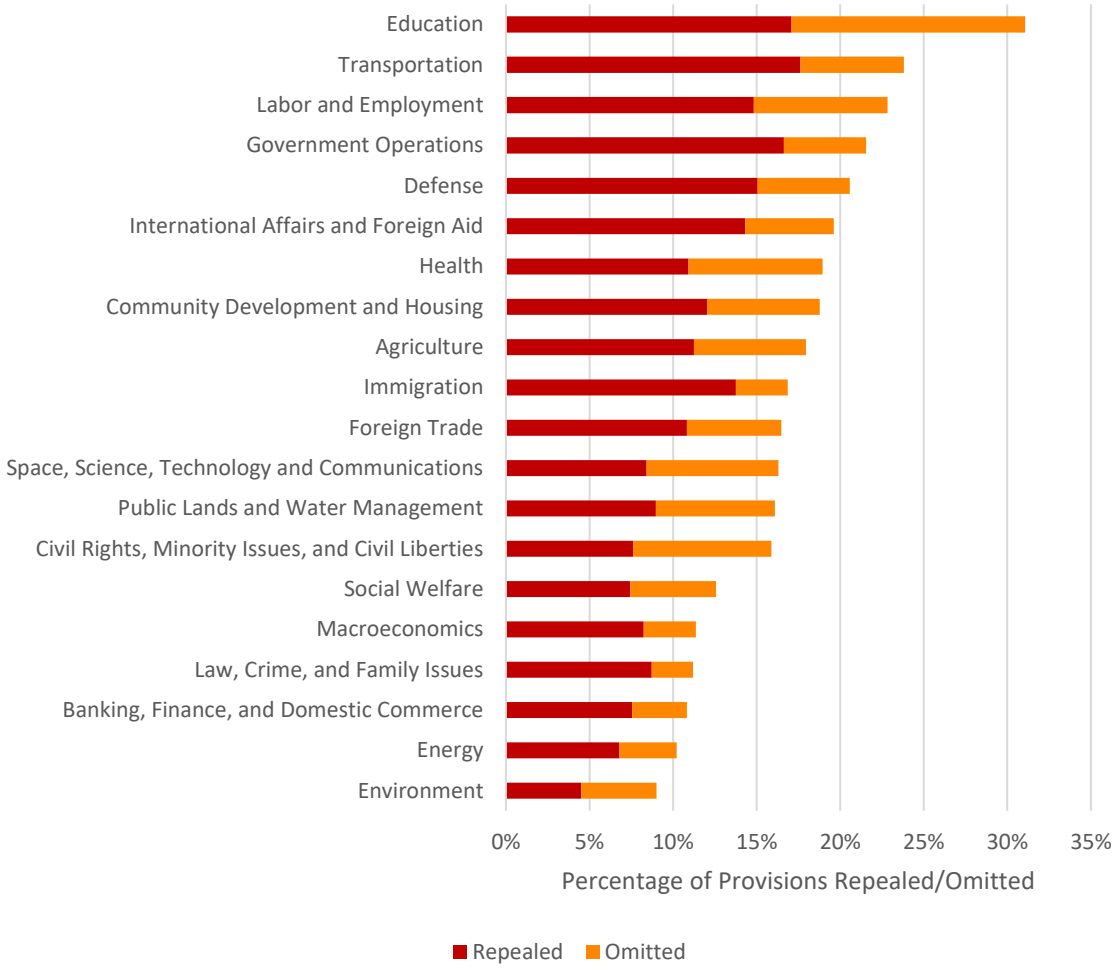


Figure 16: Proportion of Repealed/Omitted Provisions by PAP Major Topic (1789-2012). For each major topic area, the above bars represent the percentage of all provisions classified or codified into that policy area that were repealed or omitted from the United States Code.

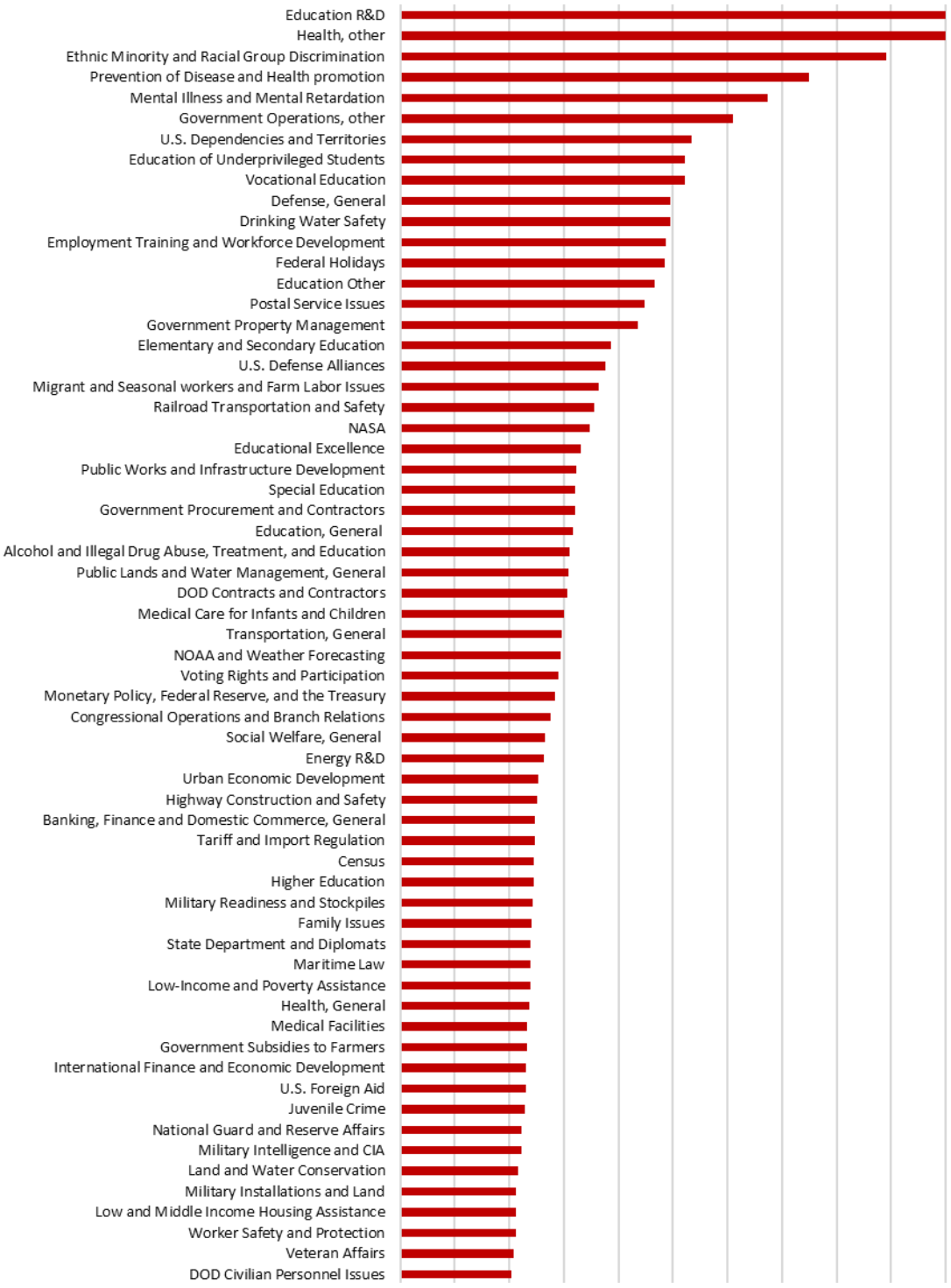

Education R&D
Health, other
Ethnic Minority and Racial Group Discrimination
Prevention of Disease and Health promotion
Mental Illness and Mental Retardation
Government Operations, other
U.S. Dependencies and Territories
Education of Underprivileged Students
Vocational Education
Defense, General
Drinking Water Safety
Employment Training and Workforce Development
Federal Holidays
Education Other
Postal Service Issues
Government Property Management
Elementary and Secondary Education
U.S. Defense Alliances
Migrant and Seasonal workers and Farm Labor Issues
Railroad Transportation and Safety
NASA
Educational Excellence
Public Works and Infrastructure Development
Special Education
Government Procurement and Contractors
Education, General
Alcohol and Illegal Drug Abuse, Treatment, and Education
Public Lands and Water Management, General
DOD Contracts and Contractors
Medical Care for Infants and Children
Transportation, General
NOAA and Weather Forecasting
Voting Rights and Participation
Monetary Policy, Federal Reserve, and the Treasury
Congressional Operations and Branch Relations
Social Welfare, General
Energy R&D
Urban Economic Development
Highway Construction and Safety
Banking, Finance and Domestic Commerce, General
Tariff and Import Regulation
Census
Higher Education
Military Readiness and Stockpiles
Family Issues
State Department and Diplomats
Maritime Law
Low-Income and Poverty Assistance
Health, General
Medical Facilities
Government Subsidies to Farmers
International Finance and Economic Development
U.S. Foreign Aid
Juvenile Crime
National Guard and Reserve Affairs
Military Intelligence and CIA
Land and Water Conservation
Military Installations and Land
Low and Middle Income Housing Assistance
Worker Safety and Protection
Veteran Affairs
DOD Civilian Personnel Issues

Figure 17

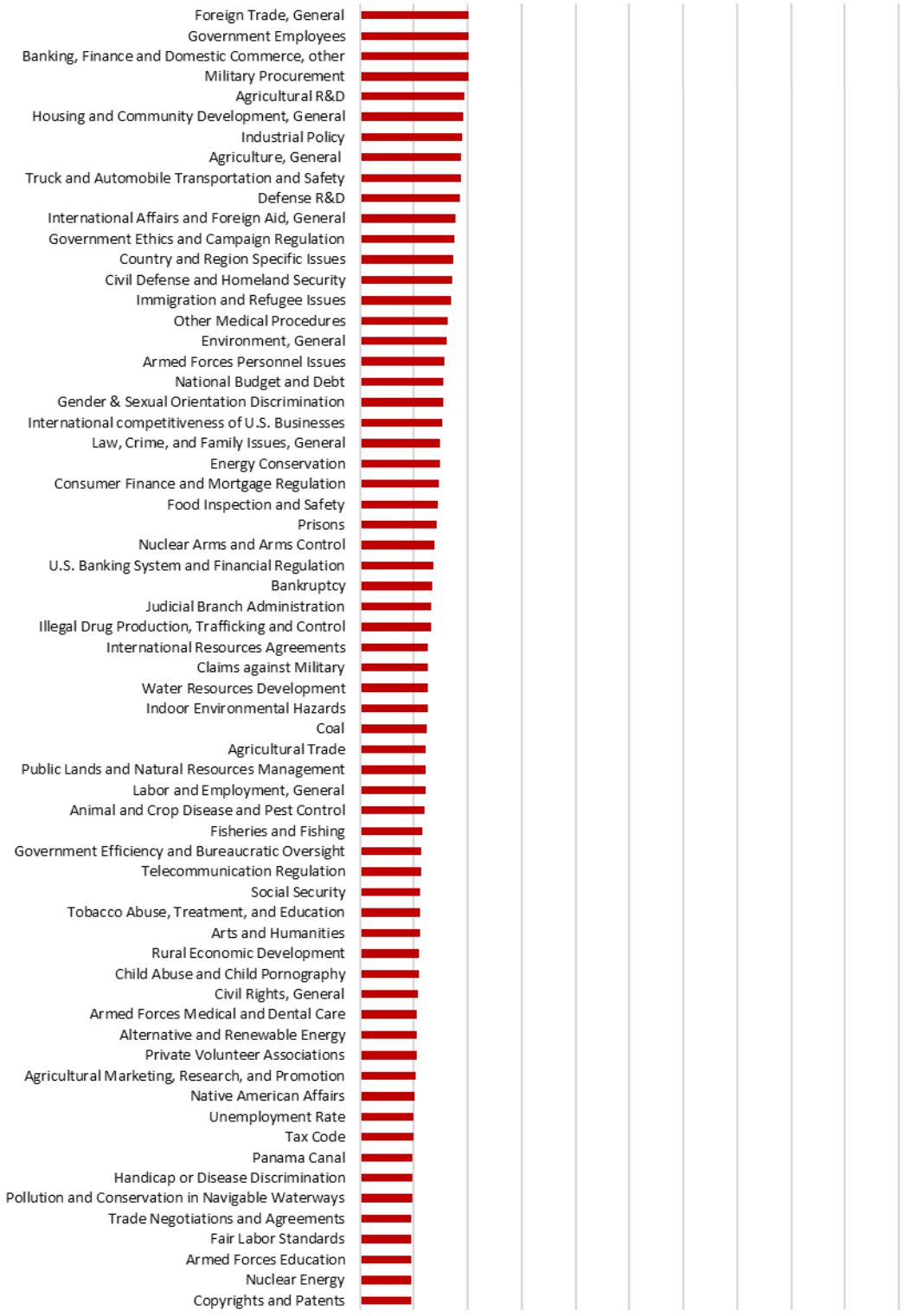

Foreign Trade, General
Government Employees
Banking, Finance and Domestic Commerce, other
Military Procurement
Agricultural R&D
Housing and Community Development, General
Industrial Policy
Agriculture, General
Truck and Automobile Transportation and Safety
Defense R&D
International Affairs and Foreign Aid, General
Government Ethics and Campaign Regulation
Country and Region Specific Issues
Civil Defense and Homeland Security
Immigration and Refugee Issues
Other Medical Procedures
Environment, General
Armed Forces Personnel Issues
National Budget and Debt
Gender & Sexual Orientation Discrimination
International competitiveness of U.S. Businesses
Law, Crime, and Family Issues, General
Energy Conservation
Consumer Finance and Mortgage Regulation
Food Inspection and Safety
Prisons
Nuclear Arms and Arms Control
U.S. Banking System and Financial Regulation
Bankruptcy
Judicial Branch Administration
Illegal Drug Production, Trafficking and Control
International Resources Agreements
Claims against Military
Water Resources Development
Indoor Environmental Hazards
Coal
Agricultural Trade
Public Lands and Natural Resources Management
Labor and Employment, General
Animal and Crop Disease and Pest Control
Fisheries and Fishing
Government Efficiency and Bureaucratic Oversight
Telecommunication Regulation
Social Security
Tobacco Abuse, Treatment, and Education
Arts and Humanities
Rural Economic Development
Child Abuse and Child Pornography
Civil Rights, General
Armed Forces Medical and Dental Care
Alternative and Renewable Energy
Private Volunteer Associations
Agricultural Marketing, Research, and Promotion
Native American Affairs
Unemployment Rate
Tax Code
Panama Canal
Handicap or Disease Discrimination
Pollution and Conservation in Navigable Waterways
Trade Negotiations and Agreements
Fair Labor Standards
Armed Forces Education
Nuclear Energy
Copyrights and Patents

Figure 17

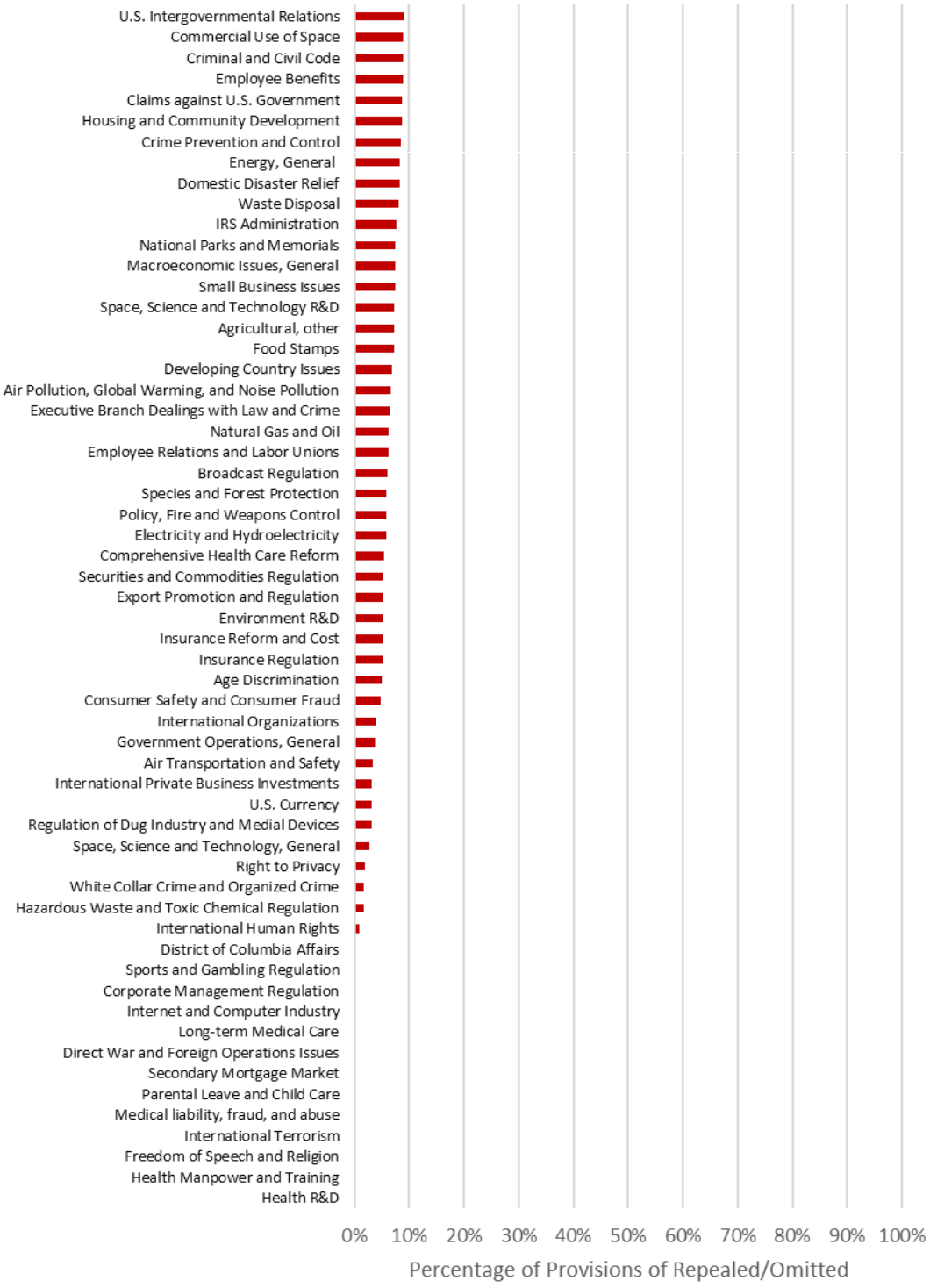


Figure 17: Percentage of Repealed/Omitted Provisions by PAP Subtopic (1789-2012).

One pattern that emerges is that policies that are either very old and well-established functions of government (defense and government operations) or relatively new and complex functions (health, education, labor and employment) are both at a higher risk of being repealed or omitted. Old functions of the federal government have amassed a greater number of provisions over a longer period, giving Congress, the courts and federal agencies more content to work with and more time to nullify their provisions. New functions of the federal government have amassed many provisions over a relatively short period, giving the federal government less time to nullify provisions. Despite this shorter time period, newer functions of government are just as likely and sometimes more likely to be repealed or omitted than older functions. In either case, these findings speak to the need to incorporate measures of provision level policy content when attempting to estimate models of legislative durability. In the models presented in Chapters 5 and 6, I include provision level measures for policy content, as well as measures of Congress' experience in each of these areas at the time of a new law's passage.

Visualizing Lasting Law

Another benefit of including indicators of provision level durability and policy content is that I can more accurately measure the policy output of the federal government than has previously been possible. Past efforts to measure Congress' legislative output have either focused on landmark laws (Mayhew 1991, 2005), significant legislation (Ansolabehere, Palmer, and Scheer 2014), or the spread of policy topics on Congress' post-war agenda (Baumgartner and Jones 2015, Jones, Whyman and Theriault 2016). None of these studies have accounted for the fact that many provisions perish and the full measure of Congress' output is contingent upon both what it enacts and what lasts.

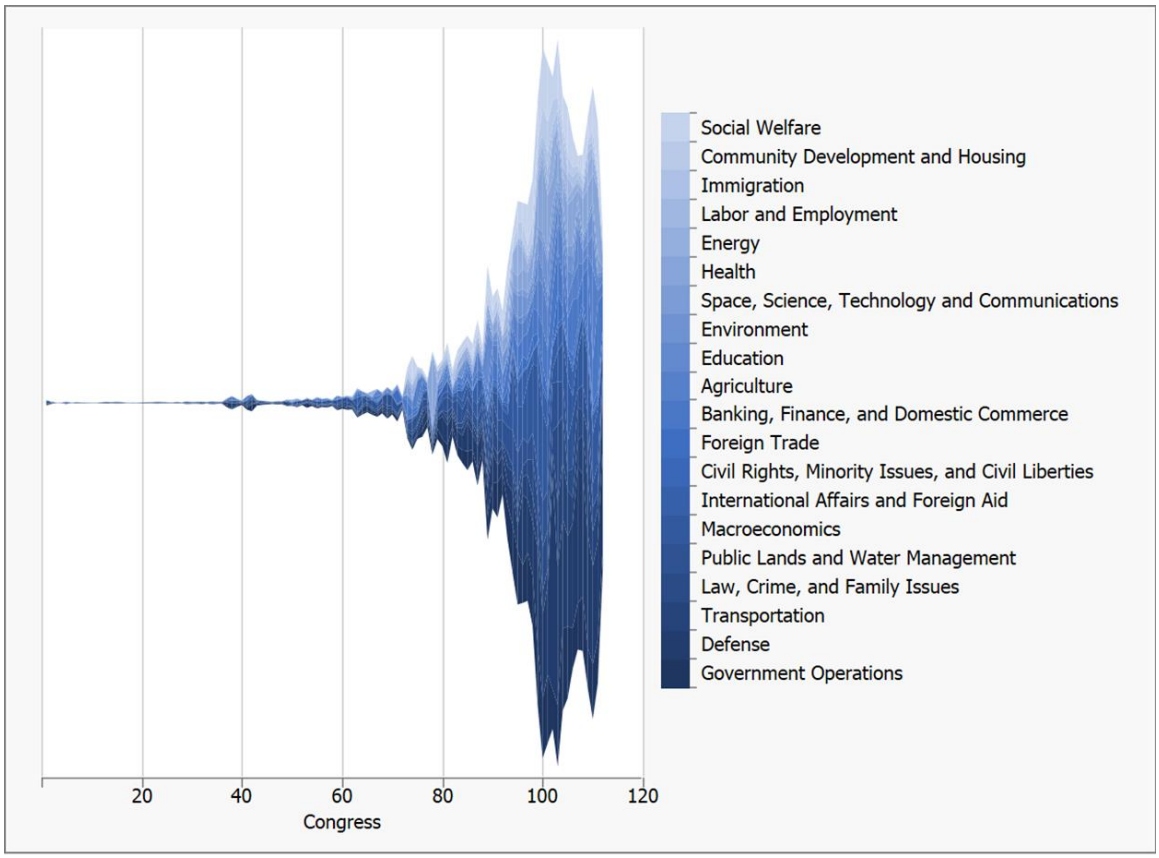


Figure 18: Stream Chart of Standing Provisions of Federal Law (1st-112th Congress). The vast majority of our standing law was enacted in the last 30 years. The average age of standing provisions as of January 15th, 2013 is 29 years and 346 days.

The stream chart in Figure 18 depicts the enduring policy output of the federal government. It includes standing provisions of federal law, less all repeals and omissions, as of January 15th, 2013. Gradient shades of blue represent the relative age of each policy area. The darkest shades represent the oldest functions of government, while the lightest shades represent the newest functions of government. The height of each blue section on the Y axis represents the total volume of provisions enacted by each Congress, noted on the X axis. The average age of standing provisions of federal law is 29 years and 364 days. The majority of standing law is less than 30 years old, meaning that most of the provisions

readers of this dissertation are responsible for following were enacted during their lifetimes.

Before the Reconstruction, laws were passed sparingly and primarily concentrated in policy domains like Government Operations, Defense, Transportation & Infrastructure, Crime, and Public Lands. During Reconstruction (38th to 44th Congress, 1962 to 1976) Congress expanded the volume of federal policy output by passing several durable acts that radically reconstructed the American South after the Civil War. The progressive era (52nd to 66th Congress, the 1890s to 1920s) marked the next durable expansion of federal policy output. This period was characterized by the passage of legislation in policy areas that were new to federal government involvement, like agriculture, education, labor and energy.

The progressive era was followed by Roosevelt's New Deal programs (73rd to 75th Congress, 1933 to 1938) and Johnson's Great Society programs (88th to 89th Congress, 1964 to 1965), which still form the basis for the American welfare state. Congress passed its largest volume of durable law between the 91st and 106th Congresses (the 1970s to 1990's), peaking in the 103rd Congress (1993-1994). Following the explosion in the breadth and depth of policymaking in the 1970s, 1980s, and 1990s, Republicans gained control of the House of Representatives in the Republican revolution and maintained control from the 104th to the 109th Congress (1995-2006). During this period, they passed fewer provisions overall and correspondingly, fewer durable provisions. Congress enjoyed a brief resurgence in productivity when Democrats controlled both branches of government under President Obama, during the 111th Congress.

The rate of durable legislative output for Congress should be understood as a function of how many provisions each Congress enacts, how many of those provisions endured, and in which policy areas. Whereas the stream chart in Figure 18 records the policy content of the total volume of standing provisions of law, Figure 19 records the

number of standing provisions as a percentage of the total number of provisions enacted by each Congress.

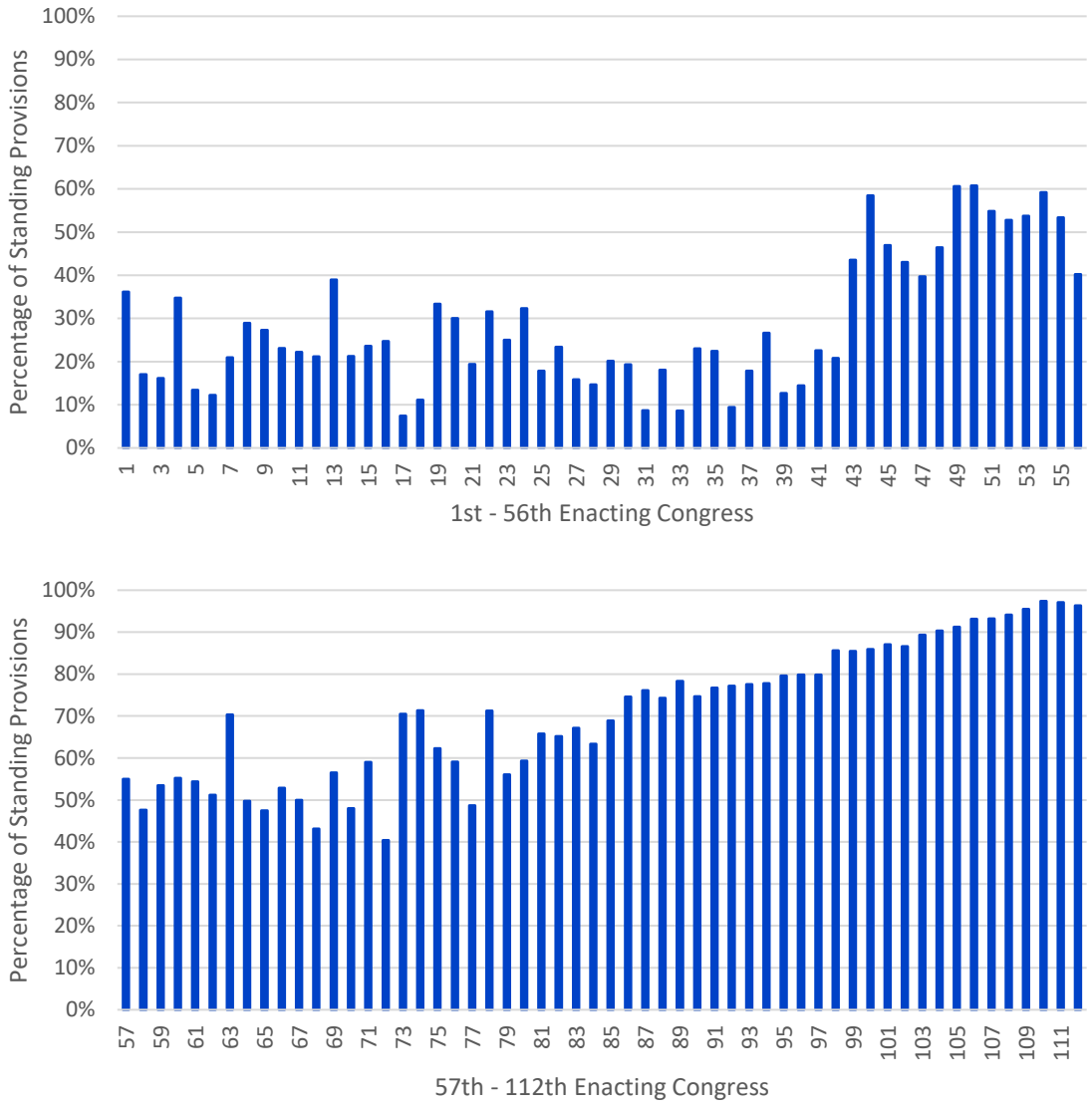


Figure 19: Standing Provisions of Federal Law (1st-112th Congress).

Some Congresses pass more durable law than for others. For example, almost forty percent of the provisions enacted by the first Congress still stand today. In contrast, less

than ten percent of the provisions enacted by the seventeenth Congress are still in force. Similarly, more than seventy percent of Roosevelt's New Deal provisions (73rd and 74th Congress) have survived and only forty percent of provisions passed by the prior Congress (72nd Congress). Provisions enacted by the most recent congresses appear to be the most durable. This appearance is deceiving. Given that our observation of the durability of these provisions ends with the termination of the dataset at the end of the 112th Congress, their true durability is unobserved. To put it another way, lawmakers have had less time to repeal or omit provisions they only recently passed. Even accounting for temporal proximity to the end of the observed dataset, it is clear that some Congresses pass a greater number of durable provisions than do others. Given this variation, I have included various indicators for differences among congresses in the models I estimate in Chapters 5 and 6.

The dataset I have described and visualized in this chapter is the only complete accounting of the evolution of statutory law in the United States. It is a seminal resource for tracking the lives and deaths of individual provisions of federal law. I hand-collected all of its 268,935 observations from the tables and volumes of the United States Code and recorded the passage and repeal dates, where applicable, for each provision from the founding of the United States. I assigned Policy Agendas Project major topic and subtopic codes to each provision based on its policy content, culminating in a comprehensive measure of the durable policy output of the federal government across time.

In the next two chapters, I use this dataset to estimate logit and duration models to explain variation in the durability of individual provisions of federal law.

Chapter 5: Modeling the Determinants of Legislative Durability

In this chapter, I investigate the determinates of legislative durability over a long span of United States history. The investigation is broken into three periods, historic legislative durability (1879-2012), modern legislative durability (1973-2010) and landmark legislative durability (1973-2010). Each period is characterized by the availability of different indicators for the degree to which Congress drew on diverse sources of information, deliberated, and compromised on the substance of legislation.

I present three models in each period, one for each unique formulation of the dependent variable. As readers will remember from Chapter 2, only Congress may repeal its own provisions. However, all of the branches of the federal government play a role in omitting provisions. Given potential differences in the processes that generate repeals and omissions, they are modeled separately. In the first model, I measure the termination of provisions with regard to both repeals and omissions. In the second model, I measure the termination of provisions with regard only to repeals. In the third model, I measure the termination of provisions with regard only to omissions.

As a result of the abundance of models estimated in this chapter (9 logit models) and the number of hypotheses tested in these models (14 unique hypotheses), the content within each section, historic, modern, and landmark durability, is organized in a formulaic fashion. I first remind readers of my expectations (hypotheses), derived from the theory of legislative durability described in Chapter 3, and discuss measures for each of the key indicators that appear in the models within that section. Some hypotheses and accompanying indicators are discussed out of numerical order in accordance with the presentation of the models that test them. For example, variables measuring the consideration of legislation in committee do not appear in analyses until the modern

lawmaking section. Similarly, the effect of the proportion of members of congress who vote, 'aye' for legislation, is only discussed in the landmark durability section.

Following my discussion of the measurement of each indicator, I conduct a directional bivariate analysis between each of these indicators and my key dependent variable. Given that the dependent variable for provision level durability is dichotomous (1 for repealed or omitted, 0 otherwise) I investigate these relationships using bivariate logistic regressions and present the results within the text as odds ratios.

I then present the conditional effects of indicators on the durability of provisions, estimated using logit models, first as hazard ratios in a table, then as a forest plot for the first model. I focus on the results of the first model in each section, in particular, because its dependent variable measures the termination of provisions with regard to both repeals and omissions. As such, it is the only formulation of the dependent variable that captures the role that all three branches play in legislative durability. Following each model, I discuss its main substantive results, using plots of the predicted probabilities for the effect of individual indicators on provision level durability.

Where there are notable differences in the determinates of durability for repeals or omissions of law, I reserve my discussion of those differences until the end of this chapter. The aim of this formulaic structure is to enable readers to identify which indicators are tested in which models. At the end of this chapter, I summarize the findings from these analyses and attempt to resolve discrepancies between what my theory predicts and any divergent results.

HISTORIC LEGISLATIVE DURABILITY (1879-2012)

The first set of models have the broadest historical scope, 1879 to 2012. The models within this section include 256,956 provisions or unique observations of legislative durability.[17] This time span captures the entire period from the end of reconstruction in the 46th Congress to the 112th Congress. Over this period, the policy functions of the federal government evolved, Congress substantially reorganized its committee system and the Democratic and Republican parties became the broad-based voting coalitions we recognize today. This period delivers significant variation regarding the political context at the time of enactment. Over the 134 years in this analysis, several periods of relatively high and low polarization have occurred in the House and Senate (McCarty, Poole and Rosenthal 2006; Theriault 2008), and several switches between periods of unified and divided government.

Indicators for Information and Deliberation

The first core precept of my theory of legislative durability is that Congress' ability to enact high quality, durable legislation, is dependent upon lawmakers' access to diverse sources of information and opportunities to engage in deliberation. Within models for historic legislative durability, I estimate the probability that Congress has had the time to engage in these activities by including an indicator for provisions that were enacted in the last two months of a Congress.

Last Two Months of a Congress

Sufficient time is one of the primary resources Congress needs to engage in information collection and deliberation. If legislators have time for unrestricted debate and deliberation, they are able to gather information that will inform the quality of the policies

[17] This model excludes 1,816 provisions for which policy codes could not be assigned because no record for their chapter exists within U.S. Code.

they enact. Higher quality policies are more durable. However, if debate in Congress is truncated, lawmakers have less time to craft high quality law.

As a result of enacting a disproportionately greater number of bills during the last two months of a congress, lawmakers afford each bill less consideration than they otherwise might if they had more time. This observation led me to predict that provisions enacted in the last two months of a congress will be less durable.

Hypothesis 2: *Provisions within laws that are enacted in the last two months of a congress will be less durable.*

The indicator, **Last Two Months of a Congress** is measured as a dichotomous variable (1 if the provision was enacted during the last two months of a Congress, 0 otherwise). I do not find support for this hypothesis in the bivariate context. The odds that a provision will be repealed or omitted decrease by 45 percent if it is enacted in the last two months of a congress, or=.555, p<.001. I anticipate that the direction of this effect will reverse once I have controlled for other determinants of durability.

Institutional Experience

Information plays a vital role in Congress' ability to solve problems in the long-term. Congress gains some measure of information through its institutional experience of legislating within particular policy areas. This experience helps lawmakers craft more durable solutions to well-understood policy problems. Based on this precept, I predict that Congress will be better positioned to enact durable provisions in policy domains where it has greater institutional experience.

Hypothesis 4: *Provisions within policy domains that Congress has more experience legislating on will be more durable.*

The indicator for the amount of institutional experience Congress has is domain-specific. **Age of Policy Area** is measured by a count of extant provisions within the PAP major topic area the provision of interest is coded into, normalized according to the number of provisions within each respective domain. This indicator takes on values between 1 and 0. Higher values indicate that Congress has more experience in the policy domain. Lower values indicate that Congress has less experience in the policy domain. I find support for this hypothesis in the bivariate context. The odds that a provision will be repealed or omitted decrease by 98 percent for provisions within domains that Congress has a great deal of experience with, or=.02, p<.001.

This bivariate coefficient is substantially inflated because it is highly correlated with the passage of time. Provisions which have only recently been enacted face a lower risk of being repealed or omitted because Congress, the Executive, and the Supreme Court, have not had time to repeal or omit them. I control for the independent effect of time on the durability of provisions in all models.

Build-up of Law

Given that modern lawmaking takes place in the shadow of a massive extant legal corpus, lawmakers must craft provisions to fit into this existing structure. Readers will recall that I proposed two contradictory provisions for the effect of the build-up of law on the durability of provisions. The first prediction was that the existence of a large extant corpus puts lawmakers at an information disadvantage, which makes it more difficult for them to craft enduring law.

Hypothesis 5: *Provisions enacted within policy domains characterized by a large build-up of extant law, will be <u>less</u> durable than provisions enacted within domains with a modest build-up of extant law.*

The second prediction was that the existence of a large extant corpus increases the entrenchment of law and makes it more difficult for legislators to repeal or omit extant provisions.

Hypothesis 6: *Provisions enacted within policy domains characterized by a large build-up of extant law, will be more durable than provisions enacted within domains with a modest build-up of extant law.*

The **Build-Up of Law in Policy Area**s at the time of a provision's passage is measured by a count of the number of provisions that were enacted prior to the passage of the current provision in the same PAP major topic area. I do not find support for either hypothesis in the bivariate context. The odds that a provision will be repealed or omitted are not dependent on the build-up of law within the relevant policy area, or=1.00, p<.001.

Indicators for Compromise

The second core precept of my theory of legislative durability is that a law must represent a substantive compromise among the diverse interests that characterize Congress to endure changes in party control of government. Legislation that represents a substantive compromise attracts a larger and more diverse cadre of supporters, who can defend the law against attempts to dismantle it. In historic durability models, I measure the potential for compromise by including indicators for omnibus legislation, non-germane provisions, polarization and conditions of unified or divided government.

Omnibus Legislation and Non-Germane Provisions

In Chapter 3, I argued that the use of omnibus legislation and the inclusion of non-germane provisions serve as impediments to reaching a substantive compromise. Considering separable policies within the same piece of legislation requires lawmakers to

make trade-offs between enacting the policy they prefer, along with a policy they may not, or foregoing the opportunity to enact either policy. This deprives legislators of the opportunity to reveal their sincere preferences for each separable policy. If lawmakers do not a support a provision on its own merit, they are less likely to defend it against subsequent coalitions' attempts to nullify it. This insight generated two hypotheses, the first of which dealt with omnibus legislation.

Hypothesis 7: *Provisions within omnibus legislation will be less durable.*

Omnibus legislation is indicated by a continuous variable that is a count of the **Number of Policy Areas** into which the provisions within a law are codified. Like all measures for policy content that appear in the models in this dissertation, the indicator is coded using the PAP major topic codes. By adopting a continuous measure of the number of policies addressed in legislation, the measure reveals the degree to which a law is omnibus. A law may address one major policy area, or up to twenty. I do not find support for this hypothesis in the bivariate context. The odds that a provision will be repealed or omitted decrease by 8 percent for every additional policy area that is addressed in a piece of legislation, or=.919, $p<.001$. I anticipate the direction of this effect will reverse, once I have controlled for the effects of other determinants of durability.

The second hypothesis deals with the specific effect of non-germane provisions on legislative durability. In particular, provisions that lay outside of the core policy domain addressed by a law will face a greater risk of being repealed or omitted.

Hypothesis 8: *Provisions addressing the core policy area of a law will be more durable than those addressing peripheral policy areas (Formula One Theory of Germaneness).*

To identify laws that address the core policy area of a law, I assigned a 1 to provisions that dealt with the core policy area represented by the preponderance of the law's provisions. I assigned a 0 to provisions that dealt a peripheral policy area. I call this

indicator **Formula One**. I find support for this hypothesis in the bivariate context. The odds that a provision will be repealed or omitted decrease by 18 percent if it deals with the core policy content of its parent law, or=.816, p<.001.

Control of Government

I made several predictions for how control of government will affect the potential for compromise and thus the durability of provisions. Under divided government the majority party is compelled to compromise with the minority to avoid a presidential veto. Under unified government the majority party has no incentive to compromise with the minority party. As a result, unified governments, on average, pass partisan policies that attract a smaller cadre of supporters who are less able to support a law after its enactment. While divided governments will enact policies that are more likely to represent a substantive compromise and be bipartisan. This leads to increased durability.

Hypothesis 11: *Provisions within laws enacted during periods of divided government will be more durable.*

Conditions of unified or **Divided Government** are measured using a dichotomous indicator variable (1 for divided, 0 for unified). I find support for this hypothesis in the bivariate context. The odds that a provision will be repealed or omitted decrease by 44 percent if the provision is enacted by a divided government, or=.56, p<.001.

Shifts in Control of Government

While unified governments are free to enact policies that are minimally adulterated by minority preferences, this freedom faces consequences when control of government changes hands.

Hypothesis 12: *Provisions within laws enacted by a unified government face an increasing risk of repeal or omission with each subsequent congress in which the opposing party enjoys unified control of government.*

The indicator **Opposite Party Unified Governments** is a count of the number of subsequent congresses in which the opposing party enjoys unified control of government. For example, legislation enacted during unified Republican government in the 47th Congress (1881-1883) faces 20 Congress that are unified democratic by the end of the data series. Therefore, provisions enacted in the 47th Congress are assigned a 20 for this variable. I find support for this hypothesis in the bivariate context. The odds that a provision will be repealed or omitted increases by 12 percent for every additional subsequent congress controlled by the opposing party, or=1.12, p<.001.

Polarization

In Chapter 3, I argued that polarization engenders the moderate conflict that helps parties identify lasting solutions to pressing problems. Laws that overcome the gridlock associated with polarization are more likely to be bipartisan, represent a substantive compromise, and endure.

Hypothesis 13: *Provisions within laws enacted during periods of higher polarization will be more durable.*

Polarization is measured by the first dimension mean of Poole and Rosenthal's DW-Nominate scores for the House of Representatives. I find support for this hypothesis in the bivariate context. The odds that a provision will be repealed or omitted decrease by 96 percent if the provision is enacted during higher polarization, or=.04, p<.001. Like the indicator for Congresses experience in particular policy areas, this bivariate coefficient is substantially inflated because it correlates with the passage time.

Interaction between Polarization and Conditions of Government

While polarization may have an independent effect on Congress' ability to enact enduring law, it also has a combined effect with conditions of unified and divided government. Specifically, I expect that legislation that has cleared the hurdle of divided government and traversed the high-friction environment characterized by divergent party preferences in times of high polarization to be more durable.

Hypothesis 14: *Provisions within laws enacted by polarized divided governments will be more durable than those enacted by polarized unified governments.*

This interaction term, **Divided X Polarization,** is the product of the variables divided government and polarization. I find support for this hypothesis in the bivariate context. The odds that a provision will be repealed or omitted decrease by 59 percent if the provision is enacted by a polarized divided government, or=.41, $p<.001$.

Other Indicators

In addition to the indicators described above, I also include several control variables. These include law length, provision level policy content, an indicator for revised titles, and a time counter.

Law Length

Laws vary in length; some contain a single provision, while others include hundreds. Longer legislation may be less durable because it simply provides more material to amend or contest and therefore will be more likely to be repealed or omitted. Therefore the length of legislation is included as a control variable and measured by the **Number of Provisions** contained within each piece of legislation.

Policy Content

In addition to the length of legislation, I also include measures for the policy content of individual provisions. We know that policy domains have different developmental courses (Grossman 2013). Therefore it is important to include a measure of provision level policy content to capture the effect that distinct developmental trajectories have on the durability of law. Readers have already seen evidence in Chapter 4 that a provision's durability is related to its policy content. Within the following logit models, policy content is measured by a series of dichotomous variables for each PAP major topic code.

For the historic durability models, the reference category for the policy content of provisions is the PAP major topic, immigration. I choose immigration as the reference category for this period because it occupies the middle of the distribution when all twenty policy areas are arrayed by their provisions' average durability. Thus, dichotomous indicators for the policy content of provisions should be interpreted with reference to the general domain of immigration.

Revised Titles (Positive Law)

Revised titles are those titles within the United States Code that Congress reviews and enacts as positive law. In Chapter 4, I showed that Congress, on average, repeals or omits 50 percent of a title's provisions when they attempt to enact it as positive law. Given their higher likelihood of being nullified, I have included a dichotomous indicator in the following models to indicate if a provision is part of a **Revised Title** (1 for being part of a revised title, 0 otherwise).

Time Counter

A time **Counter** is included in all models to account for the general trend toward fewer repeals or omissions during the period.

Results

I have arranged my dataset on provision level durability from 1879 to 2010 to conform to the requirements of a logit regression, which defines durability according to whether a provision is repealed or omitted in the first model (1 for repealed or omitted, 0, otherwise), whether it is repealed in the second model (1 for repealed, 0 otherwise), and whether it is omitted in the third (1 for omitted, 0 otherwise). Every provision within each piece of legislation has the potential to be repealed or omitted between the date of its passage and the present.

In the context of logit models, to substantively interpret the parameter estimates, each coefficient may be exponentiated and interpreted as odds ratios. I have done so and present the results for each of the three models in Table 1.

Table 1: Determinants of Repeal and Omission (1879-2012), Logit Odds Ratios

	Rep & Omit	Repeal	Omission
Number of Policy Areas	1.059***	1.040***	1.069***
	(0.00)	(0.00)	(0.00)
Formula One	0.865***	0.910***	0.820***
	-(0.01)	-(0.02)	-(0.02)
Number of Provisions	0.999***	0.999***	0.999***
	(0.00)	(0.00)	(0.00)
Polarization	0.434***	1.043	0.111***
	-(0.04)	-(0.11)	-(0.02)
Divided Government	1.468***	1.473***	1.374***
	-(0.06)	-(0.07)	-(0.10)
Divided X Polarization	0.666***	0.659***	0.730*
	-(0.05)	-(0.05)	-(0.09)
Opposite Unifed Governments	1.029***	1.019***	1.040***
	(0.00)	(0.00)	(0.00)
Last Two Months of Congress	1.031	1.073**	0.968
	-(0.02)	-(0.02)	-(0.03)
Age of Policy Area	0.328***	0.303***	0.320***
	-(0.04)	-(0.04)	-(0.06)
Build up of Law in Policy Area	1.000***	1.000***	1.000***
	(0.00)	(0.00)	(0.00)
Revised Title	1.482***	1.823***	0.374***
	-(0.03)	-(0.04)	-(0.02)
Counter	0.991***	0.990***	1
	(0.00)	(0.00)	(0.00)
Constant	75843893***	71601587***	0.096
	-(1.38E+08)	-(1.47E+08)	-(0.28)
Macroeconomics	1.018	0.732***	1.854***
	-(0.06)	-(0.05)	-(0.22)
Civil Rights, Minority Issues, and Civil Liberties	0.817*	0.464***	2.388***
	-(0.07)	-(0.05)	-(0.34)
Health	1.601***	0.998	3.663***
	-(0.09)	-(0.06)	-(0.40)
Agriculture	1.162**	0.869*	2.290***
	-(0.07)	-(0.05)	-(0.25)
Labor and Employment	1.539***	1.170*	2.588***
	-(0.10)	-(0.08)	-(0.31)
Education	2.783***	1.582***	5.743***
	-(0.15)	-(0.10)	-(0.62)
Environment	0.480***	0.301***	1.398**
	-(0.03)	-(0.02)	-(0.16)

Table 1, cont.

Energy	0.558***	0.483***	1.034
	-(0.04)	-(0.04)	-(0.13)
Transportation	1.626***	1.244***	3.008***
	-(0.09)	-(0.07)	-(0.33)
Law, Crime, and Family Issues	0.525***	0.465***	0.925
	-(0.03)	-(0.03)	-(0.11)
Social Welfare	0.858**	0.609***	1.969***
	-(0.05)	-(0.04)	-(0.22)
Community Development and Housing	1.047	0.866*	1.841***
	-(0.06)	-(0.06)	-(0.21)
Banking, Finance, and Domestic Commerce	0.640***	0.519***	1.194
	-(0.04)	-(0.03)	-(0.14)
Defense	1.960***	1.451***	3.129***
	-(0.11)	-(0.09)	-(0.36)
Space, Science, Technology and Communications	0.869*	0.514***	2.539***
	-(0.06)	-(0.04)	-(0.31)
Foreign Trade	0.786***	0.589***	1.796***
	-(0.05)	-(0.04)	-(0.22)
International Affairs and Foreign Aid	1.169**	1.068	1.610***
	-(0.07)	-(0.07)	-(0.18)
Government Operations	1.432***	1.122	2.351***
	-(0.08)	-(0.07)	-(0.27)
Public Lands and Water Management	0.817***	0.489***	2.534***
	-(0.05)	-(0.03)	-(0.29)
Pseudo R^2	0.138	0.117	0.09
Observations	256,956	256,956	256,956

* p<.05; ** p<.01; *** p<.001

Given that it is easier to quickly identify the direction and magnitude of effects for each indicator if they are presented visually, I have plotted the results for the first model as a forest plot in Figure 20. If the odds ratio is less than 1, and to the left of the line, then the provision is more durable. If the odds ratio is greater than 1, and to the right of the line, then the provision is less durable. If the lines that bisect the point estimates cross the midline, marked by 1, then the result is statistically insignificant.

Figure 20: Forest Plot of odds ratios for the determinants of repeal or omission (1879-2012).

A cursory examination of Figure 20 reveals that provisions are most likely to endure when they are enacted before the last two months of a congress, contained within non-omnibus legislation, germane to the core policy content of the legislation, and part of a non-revised title. Further, the most durable provisions are enacted after Congress has gained institutional experience in the relevant policy area and during periods of unified government, higher polarization, or polarized divided governments. Lastly, the greater the number of subsequent congresses in which the opposing party enjoys unified control of government, the more likely a provision is to be repealed. Excepting the effect of divided government, all of the effects are in the hypothesized direction.

Measures of the volume of lawmaking do not appear to be related to durability. The build-up of law in the relevant policy area has no effect on the likelihood that a provision will be repealed or omitted. The past build-up of law may be consequential for how new law is constructed, but has no effect on the probability that existing law will be nullified through either of these means. This pattern suggests that the durability of law in the United States is neither bolstered by a large corpus nor weakened by a large extant corpus. Similarly, the length of legislation is unrelated to the durability of its provisions.

The results for the effect of policy content corroborates findings from Chapter 4. The oldest functions of government, government operations and defense, and the newest functions of government, education, health, and labor, are among the least durable. Controlling for all other variables, the time counter indicates that more recently enacted provisions are no more or less likely than older provisions to be repealed or eliminated. This result is somewhat counterintuitive given that, in contrast to older provisions, more recent provisions will have had less time between enactment and any available opportunities for nullification.

To substantively interpret these results, I have calculated the predicted probabilities for each of the key variables that were found to significantly affect legislative durability from 1879 to 2012.

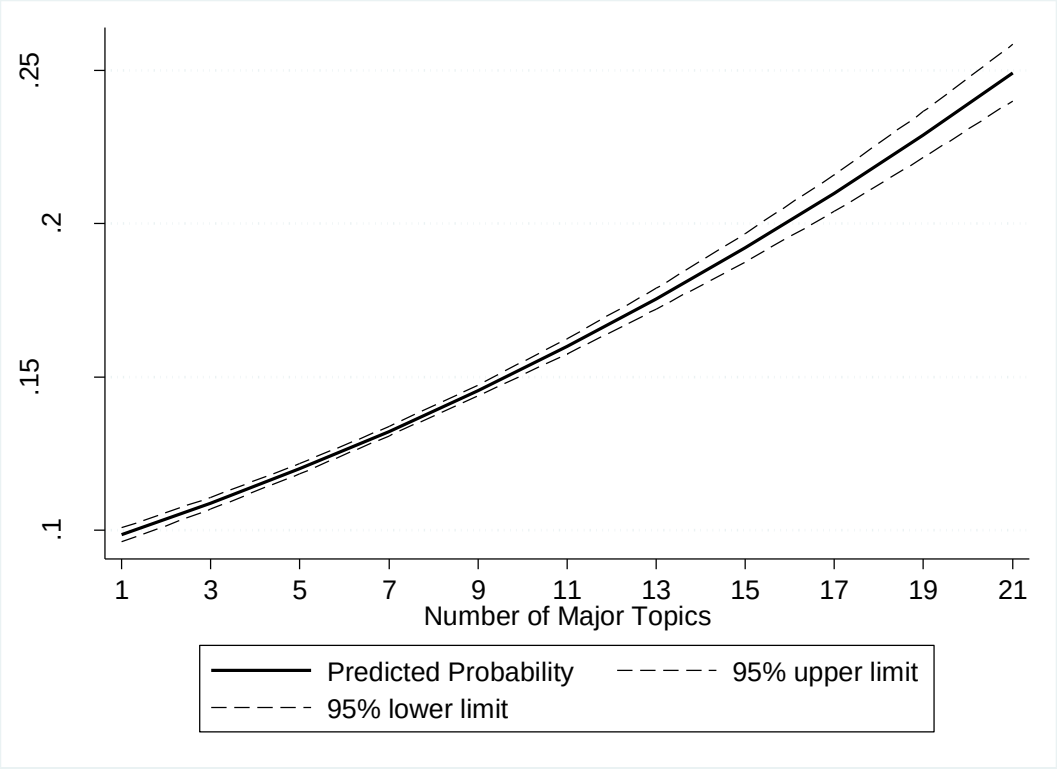


Figure 21: The Effect of Omnibus Legislation on the Probability of Repeal or Omission

Figure 21 shows changes in the predicted probability of a provision being nullified with changes in the number of policy areas addressed in legislation. As the number of policy areas addressed in a piece of legislation increases from one to 21, the probability of a provision within that law being repealed increases from 10 percent to 25 percent. Similarly, provisions within a law including content from 10 major policy areas are almost 5 percent more likely to be nullified than provisions belonging to laws with a single policy focus. Another way to think about this result is that it shows that as laws become more

omnibus, they become less durable. While the passage of omnibus legislation has a negative effect on legislative durability, Congress' store of institutional experience enables legislators to pass more durable law.

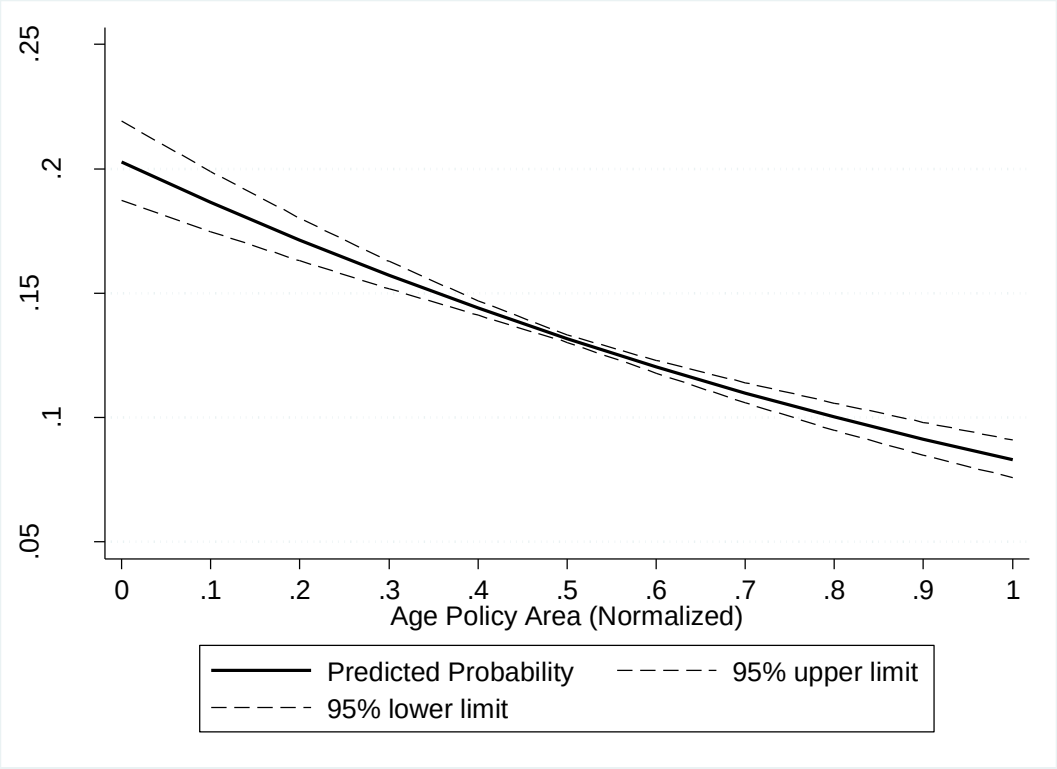


Figure 22: The Effect of Institutional Experience on the Probability of Repeal or Omission

Figure 22 plots the relationship between Congress' experience and their ability to pass enduring provisions. As the age of the policy area increases, or as Congress' experience in the relevant policy domain increases, lawmakers are better able to craft enduring policies within that domain. This effect suggests that institutional learning causes Congress to become better at solving difficult problems over time. Even if lawmakers may be getting better at solving familiar problems over time, they still must overcome the gridlock that characterizes political polarization.

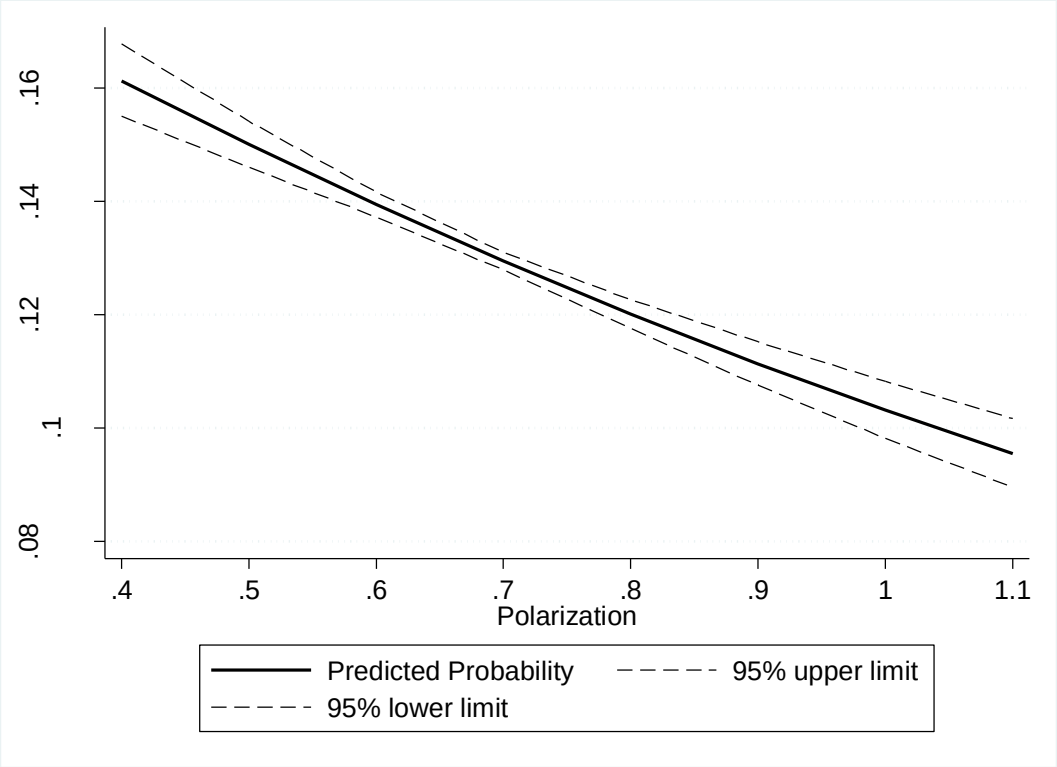


Figure 23: The Effect of Polarization on the Probability of Repeal or Omission

Figure 23, shows the predicted probability of nullification with changes in the level of polarization in Congress. As polarization at enactment increases, the probability of nullification decreases, suggesting that some distance between the parties helps them enact durable laws. Although this effect differs under conditions of unified or divided government.

Because conditions of unified or divided government is a binary variable, and only takes on values or 1 or 0, there is no variation over which to predict probabilities. Government is either divided or not. Taken by itself, the coefficient for divided government suggests that divided governments produce some of the least durable legislation. Although Congress may be just as productive under periods of divided government as it is under

unified government (Mayhew 1991), this symmetry does not hold for durability. Unified governments seem to pass more durable law. This may be because, under conditions of unified government, legislators are less constrained by compromise and the challenges of polarization and can more easily craft legislation that entrenches their preferences in the language of the law and the routines of bureaucratic implementation. I suggest that the results for polarization and divided government are somewhat misleading if you view them each in isolation. However, the interaction between the two yields robust results that are in line with the theory articulated in earlier sections (See Figure 24).

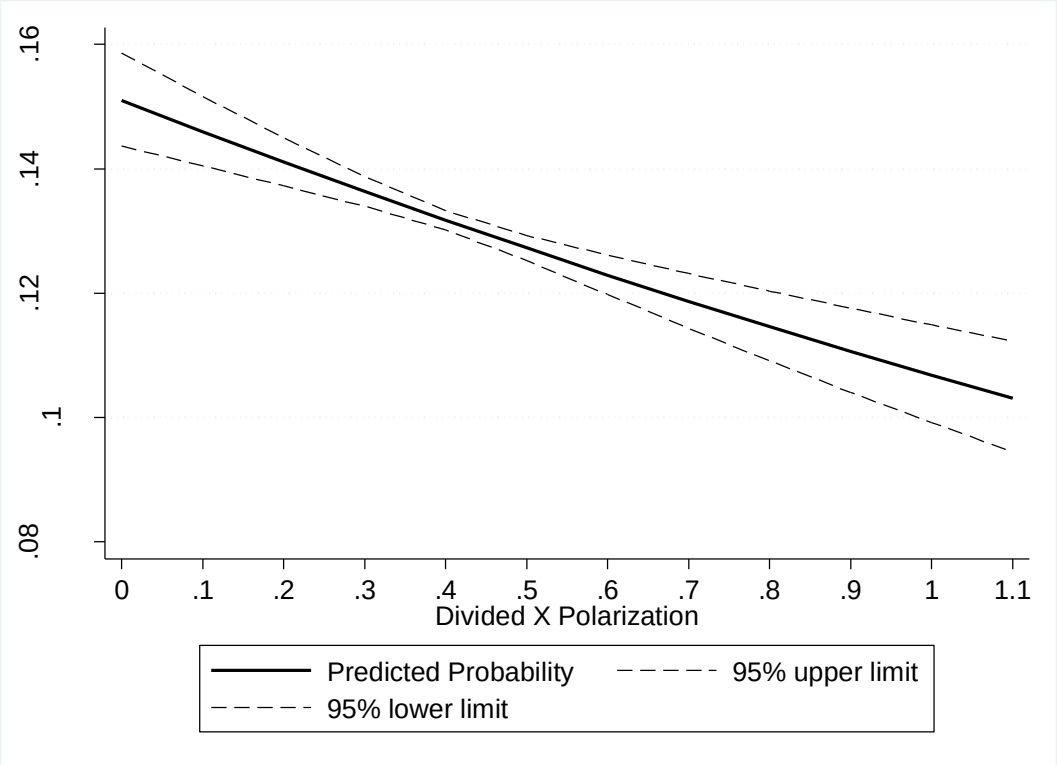


Figure 24: The Effect of Polarized Divided Governments on the Probability of Repeal or Omission

Provisions enacted during periods of both divided government and higher polarization are far more durable than those enacted under any other political circumstances. It is apparent that provisions that clear the hurdle of divided government during a highly polarized era are the most durable, while those enacted during periods of divided government and low polarization are the least durable.

This may be because ideological distance during a period of divided government creates incentives for lawmakers to introduce legislation that already represents common ground between the parties. Party leaders may only bring bills to the floor that have a higher probability of being supported by both parties. Or it may create the dynamic policy debate and the urgent need for compromise that precedes the passage of durable policies. In either case, the result is more durable legislation when the parties in Congress are distant, and the government is divided.

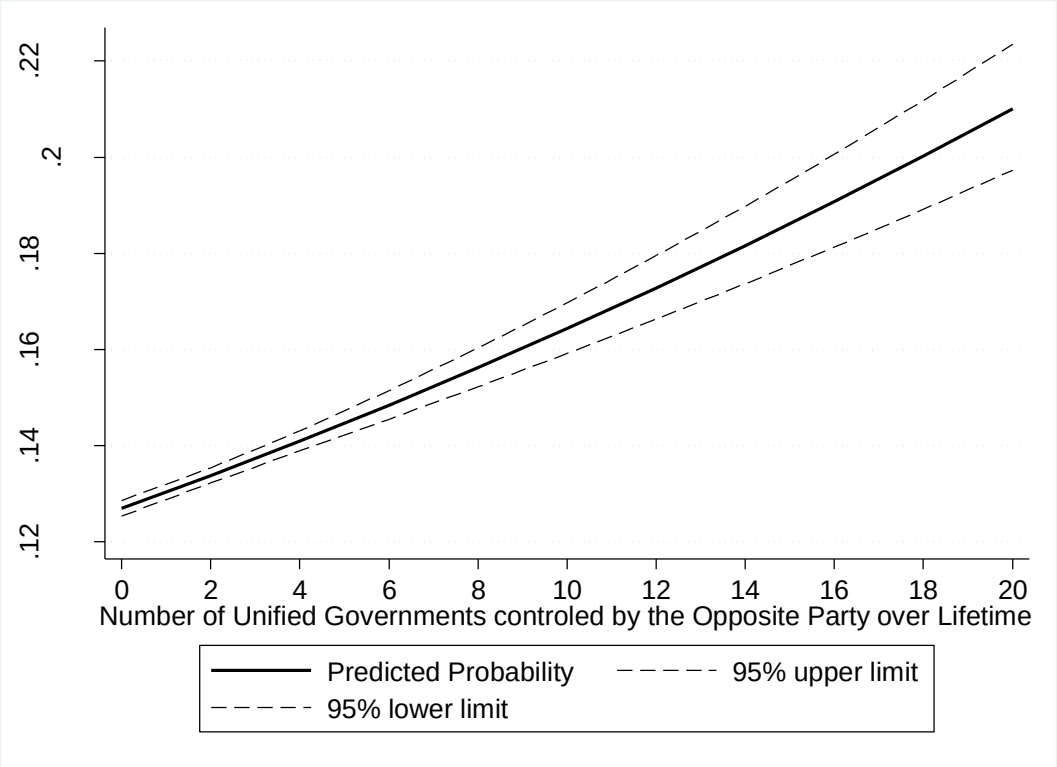


Figure 25: The Effect of the Number of Unified Opposing Governments on the Probability of Repeal and Omission

Switches in party control of unified governments also affect the durability of federal provisions. Figure 25 shows that as the number of unified governments controlled by the opposing party increases, the probability that a provision will be repealed or omitted increases. While majorities in unified governments pass the most durable law on average, they run the risk of having a greater proportion of their provisions repealed or omitted when their rival party takes control of government. This risk is proportionate to the number of congresses the opposing party can retain full control of the Executive and Legislative branches. Since this dynamic occurs over time, it is explored in greater detail in the survival models in Chapter 6.

MODERN LEGISLATIVE DURABILITY (1973-2010)

This second set of logit models are more narrowly focused on modern lawmaking, 1973-2012, and allow for the inclusion of indicators related to the consideration of bills before their enactment. These models include 178,713 observations, which covers 66 percent, or two-thirds of lawmaking activity since the founding.[18]

The choice of this particular period, 1973 to 2010, was imposed by the availability of data on bills from the Congressional Bills Project and Legislative Explorer. Together, these databases can be used to trace the exact path that a bill takes from its introduction to its enactment. Using these resources, I collected data on the number of committees each bill was referred to, its time between introduction and enactment and the number of restrictive rules that Congress passed during its consideration. The period has the added advantage of beginning after the passage of the Legislative Reorganization Act of 1970, which marked the last time Congress significantly changed its committee procedures and jurisdictions. Since 1970, the structure of the committee system has been largely stable.

Unlike the prior historic durability models, the reference category for the policy content of provisions in the modern durability models is the PAP major topic, health. I choose health as the reference category for this period because it occupies the middle of the distribution when all twenty policy areas are arrayed by their provisions' average durability. Thus, dichotomous indicators for the policy content of provisions should be interpreted with reference to the general domain of heath. Health continues to be the reference category for the remaining models in this dissertation, including those in Chapter 6.

[18] The model excludes 1,032 provisions for which policy codes could not be assigned because no record for their chapter exists within U.S. Code.

Indicators for Information and Deliberation

While in the historic durability models, I relied on blunt measures of the quality of Congress' information search and deliberation—passage in the last two months of a congress, Congress' institutional experience, and the build-up of law—in this section I can rely on finer measures. Specifically, I am able to include indicators for the precise number of committees Congress refers legislation to and the number of days a law could potentially be deliberated on by lawmakers.

Committee Referrals

Committees are the nexus for information search and processing in Congress. I suggest that lawmakers craft more durable law when they take advantage of committees' policy expertise and ability to gather information by referring bills to multiple committees.
Hypothesis 1: *Provisions within laws that are referred to multiple committees will be more durable.*

The indicator, **Number of Committees**, is a raw count of the number of House and Senate committees the bill was referred to, as collected from Legislative Explorer. I find support for this hypothesis in the bivariate context. The odds that a provision will be repealed or omitted decreases by 3 percent for every additional committee a law is referred to, or=.97, $p<.001$.

Time between Introduction and Enactment

Time is an incredibly valuable resource for legislators. Having sufficient time to consider a policy enables lawmakers to engage in an exhaustive information search, deliberate on proposed measures, and hear from interested members of the public. A longer period between a bill's introduction and enactment facilitates these types of activities, which in turn, enables lawmakers to craft resilient and enduring policies.

Hypothesis 3: *Provisions within laws that have a longer period between their introduction and enactment will be more durable.*

This indicator, **Days Between Intro and Enact** is a precise count of the number of days between a law's introduction and subsequent enactment as collected from the Congressional Bills Project. I do not find support for this hypothesis in the bivariate context. The odds that a provision will be repealed or omitted are not dependent on the number of days between a law's introduction and its subsequent enactment, or=1.00, $p<.001$.

Indicators for Compromise

In the models for historic durability, my indicators for the probability of a substantive compromise relied on attributes of the structure of legislation (omnibus laws and non-germane provisions) and conditions of government (unified, divided or polarized). In this section, I am able to include the effect of restrictive rules on Congress' ability to pass durable legislation.

Restrictive Rules

In Chapter 3, I described restrictive rules as the tools wielded by the majority to stymie the inclusion of minority preferences in legislation. Legislation that is considered under restrictive rules is less likely to represent a compromise between the majority and the minority and thus is more likely to be targeted for repeal or omission after enactment.

Hypothesis 10: *Provisions within laws considered under restrictive rules will be less durable than those considered under open rules.*

The indicator, **Number of Special Rules Passed**, is a count of special rules passed during the consideration of each law. I do not find support for this hypothesis in the

bivariate context. The odds that a provision will be repealed or omitted decreases by 21 percent for every additional rule that is passed, or=.79, p<.001.

Results

I present the results for provision level durability from 1973 to 2010 in the same manner as the previous section. Coefficient estimates have been exponentiated and are interpreted as odds ratios. The results for all three models are presented in Table 2. The results for the first model are presented as a forest plot in Figure 26.

Table 2: Determinants of Repeal and Omission (1973-2010), Logit Odds Ratios

	Rep & Omit	Repeal	Omission
Number of Policy Areas	1.023***	1.027***	1.017***
	(0.00)	(0.00)	(0.00)
Formula One	0.842***	0.852***	0.864***
	-(0.02)	-(0.02)	-(0.03)
Number of Provisions	0.999***	1.000***	0.999***
	(0.00)	(0.00)	(0.00)
Polarization	0.171***	0.350**	0.025***
	-(0.05)	-(0.11)	-(0.01)
Divided Government	1.157	1.689**	0.550*
	-(0.19)	-(0.32)	-(0.15)
Divided X Polarization	0.871	0.585**	2.041**
	-(0.13)	-(0.11)	-(0.52)
Opposite Unifed Governments	1.01	1.083	0.882
	-(0.04)	-(0.05)	-(0.07)
Days Between Intro and Enact	1.000***	1	0.999***
	(0.00)	(0.00)	(0.00)
Last Two Months of Congress	1.031	1.073**	0.968
	-(0.02)	-(0.02)	-(0.03)
Number of Special Rules Passed	1.133***	1.068***	1.263***
	-(0.01)	-(0.01)	-(0.02)
Number of Committees	0.991	1	0.969***
	(0.00)	-(0.01)	-(0.01)
Age of Policy Area	0.119***	0.276***	0.057***
	-(0.03)	-(0.09)	-(0.03)
Build up of Law in Policy Area	1.000***	1.000*	1.000***
	(0.00)	(0.00)	(0.00)
Revised Title	1.281***	1.847***	0.208***
	-(0.07)	-(0.10)	-(0.03)
Counter	1	0.997	1.014
	-(0.01)	-(0.01)	-(0.01)
Constant	3.501E+00	62.933	0
	-(3.73E+01)	-(7.98E+02)	(0.00)
Macroeconomics	0.414***	0.700***	0.229***
	-(0.02)	-(0.05)	-(0.02)
Civil Rights, Minority Issues, and Civil Liberties	0.533***	0.459***	0.714*
	-(0.06)	-(0.07)	-(0.12)
Agriculture	0.868**	1.026	0.695***
	-(0.04)	-(0.05)	-(0.05)
Labor and Employment	1.329***	1.425***	1.05
	-(0.07)	-(0.09)	-(0.09)

Table 2, cont.

Education	2.388***	1.851***	2.441***
	-(0.10)	-(0.10)	-(0.14)
Environment	0.387***	0.395***	0.437***
	-(0.02)	-(0.03)	-(0.04)
Energy	0.539***	0.658***	0.431***
	-(0.03)	-(0.05)	-(0.04)
Immigration	0.419***	0.528***	0.309***
	-(0.04)	-(0.05)	-(0.05)
Transportation	1.216***	1.387***	1.017
	-(0.05)	-(0.06)	-(0.06)
Law, Crime, and Family Issues	0.456***	0.573***	0.364***
	-(0.02)	-(0.03)	-(0.03)
Social Welfare	0.636***	0.704***	0.614***
	-(0.03)	-(0.04)	-(0.04)
Community Development and Housing	0.797***	1.002	0.527***
	-(0.05)	-(0.08)	-(0.06)
Banking, Finance, and Domestic Commerce	0.352***	0.491***	0.250***
	-(0.02)	-(0.03)	-(0.02)
Defense	0.650***	1.116	0.331***
	-(0.04)	-(0.07)	-(0.03)
Space, Science, Technology and Communications	0.747***	0.667***	0.932
	-(0.05)	-(0.06)	-(0.09)
Foreign Trade	0.543***	0.453***	0.764**
	-(0.04)	-(0.04)	-(0.08)
International Affairs and Foreign Aid	0.897*	1.194**	0.535***
	-(0.05)	-(0.07)	-(0.05)
Government Operations	0.521***	0.737***	0.324***
	-(0.03)	-(0.04)	-(0.03)
Public Lands and Water Management	0.378***	0.397***	0.414***
	-(0.03)	-(0.03)	-(0.04)
Pseudo R^2	0.086	0.058	0.097
Observations	177,681	177,681	177,681

* p<.05; ** p<.01; *** p<.001

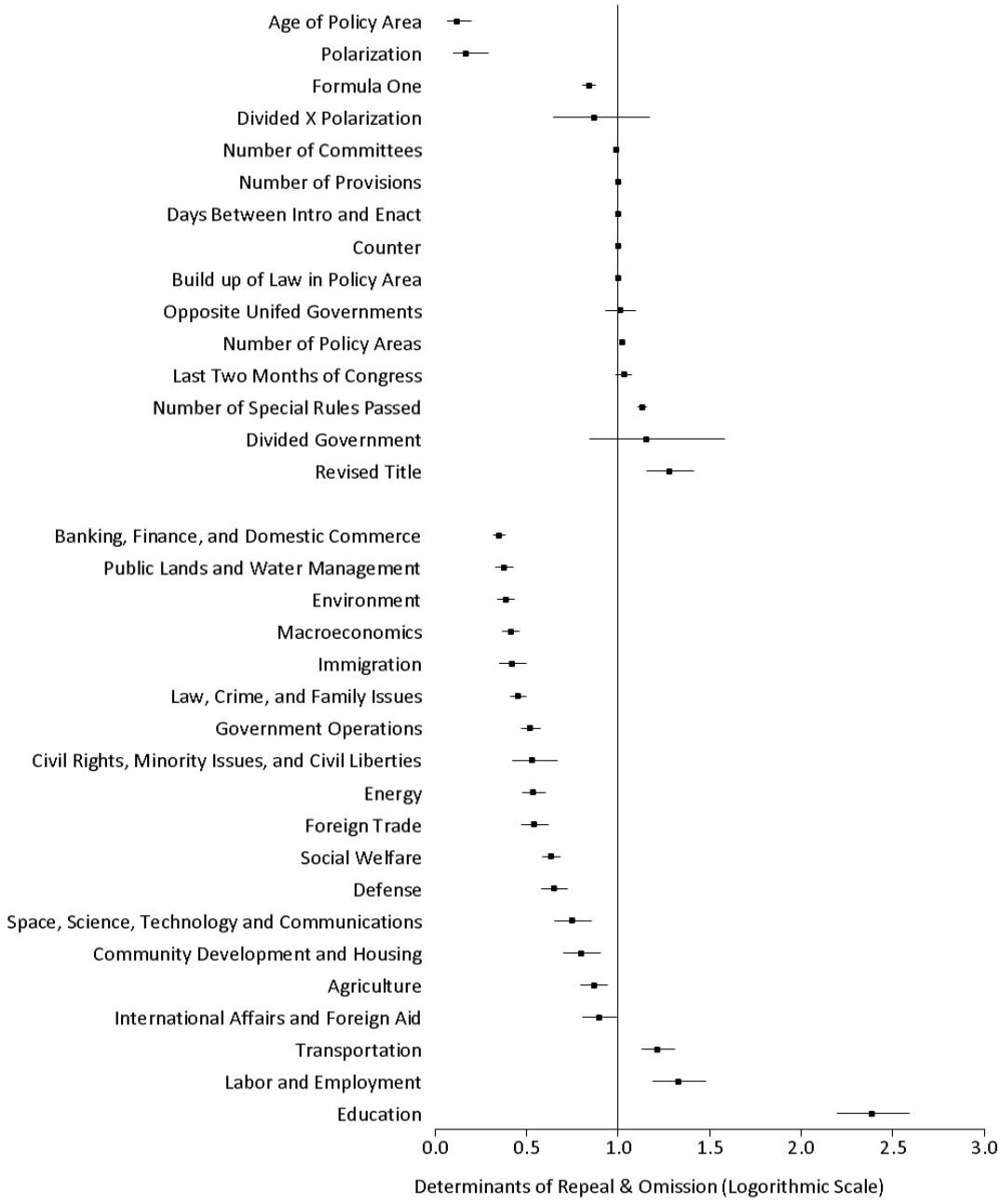


Figure 26: Forest Plot of the odds ratios for the determinants of provisions ending by either repeal or omission (1973-2010).

A comparison between the 1879-2012 and 1973-2012 models reveal that most of the key indicators have similar effects across the different model specifications. Given this correspondence, I focus on the effects of indicators which only appear in the modern durability models on provision level durability.

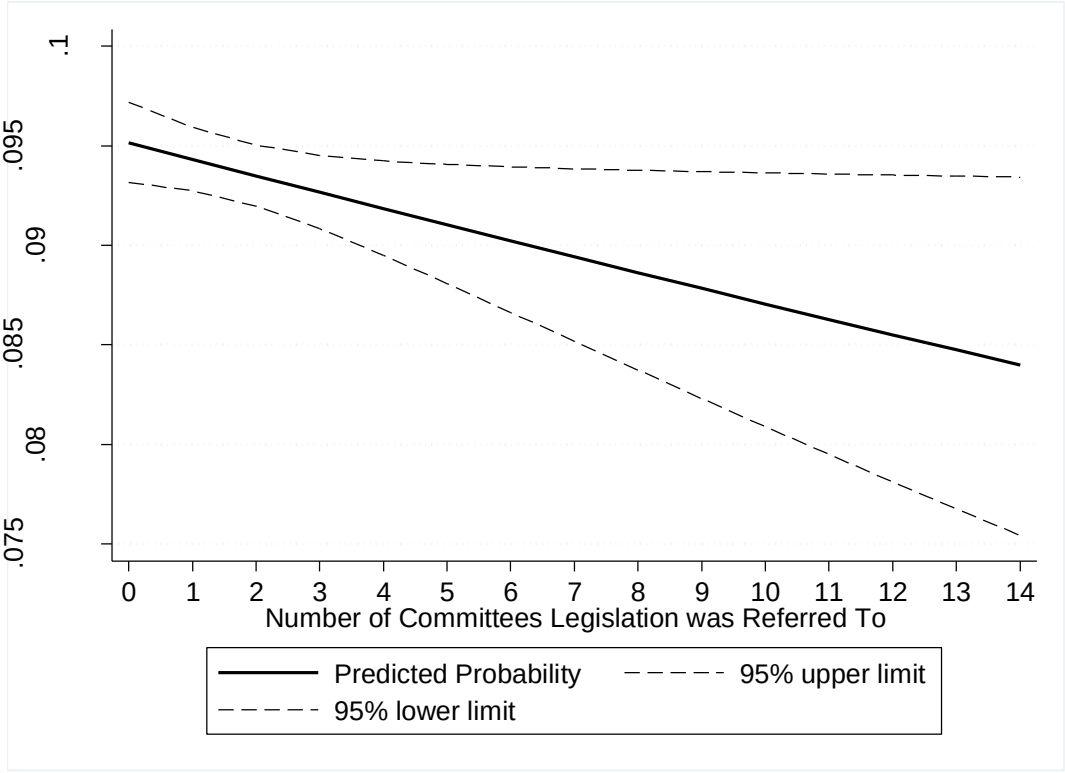


Figure 27: The Effect of the Number of Committees Legislation was Referred To on the Probability of Repeal and Omission

The results show that for every additional committee to which Congress refers a bill, the likelihood that congress will later repeal its provisions decreases (see Figure 27). After Congress refers a law to three or more committees, this decrease is accompanied by a widening confidence interval, making it unclear if referring a bill to fourteen committees

makes it more durable than referring it to three committees. However, the general direction of the trend suggests that by referring a bill to multiple committees Congress increases the chances that its provisions will endure.

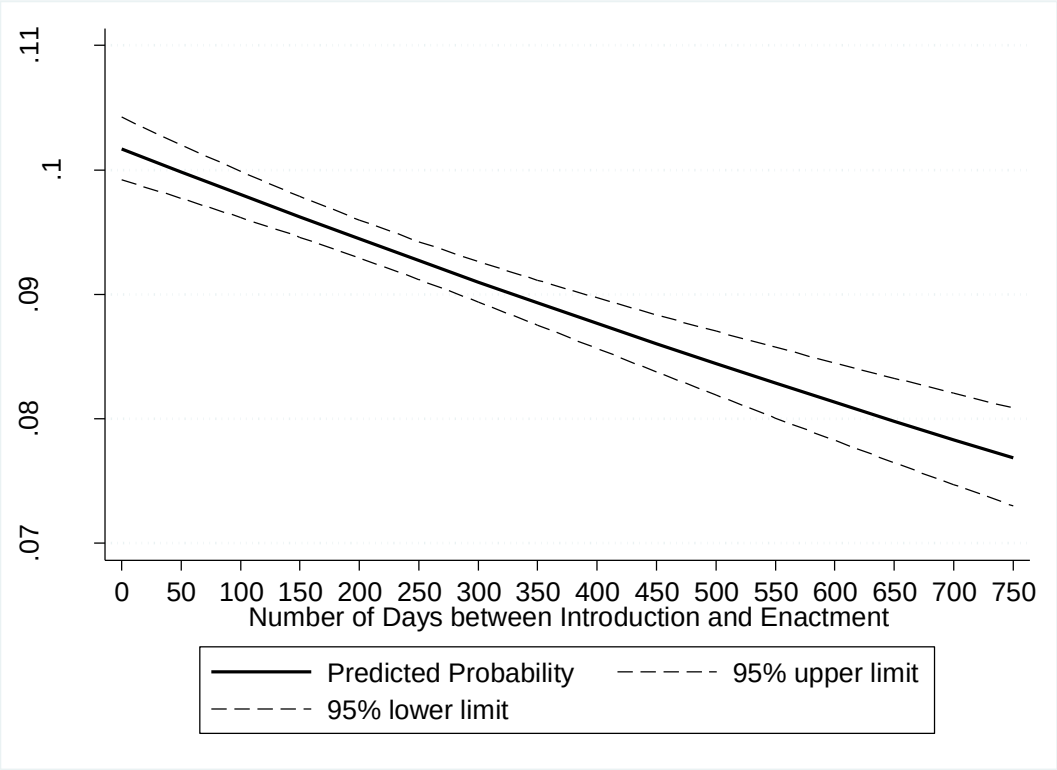


Figure 28: The Effect of the Number of Days between Introduction and Enactment on the Probability of Repeal and Omission

Similarly, Congress can increase the durability of its provisions, if it considers policies over a longer period before enacting them. Figure 28 shows that for every additional day between the introduction of a bill and its enactment, the likelihood that Congress, the Courts, or the Executive will later repeal or omit its provisions decreases. Both of these results lend support to the first core precept of the theory of legislative

durability, which suggests that diverse sources of information and sufficient time to deliberate proposed policies increase Congress' ability to enact enduring policies.

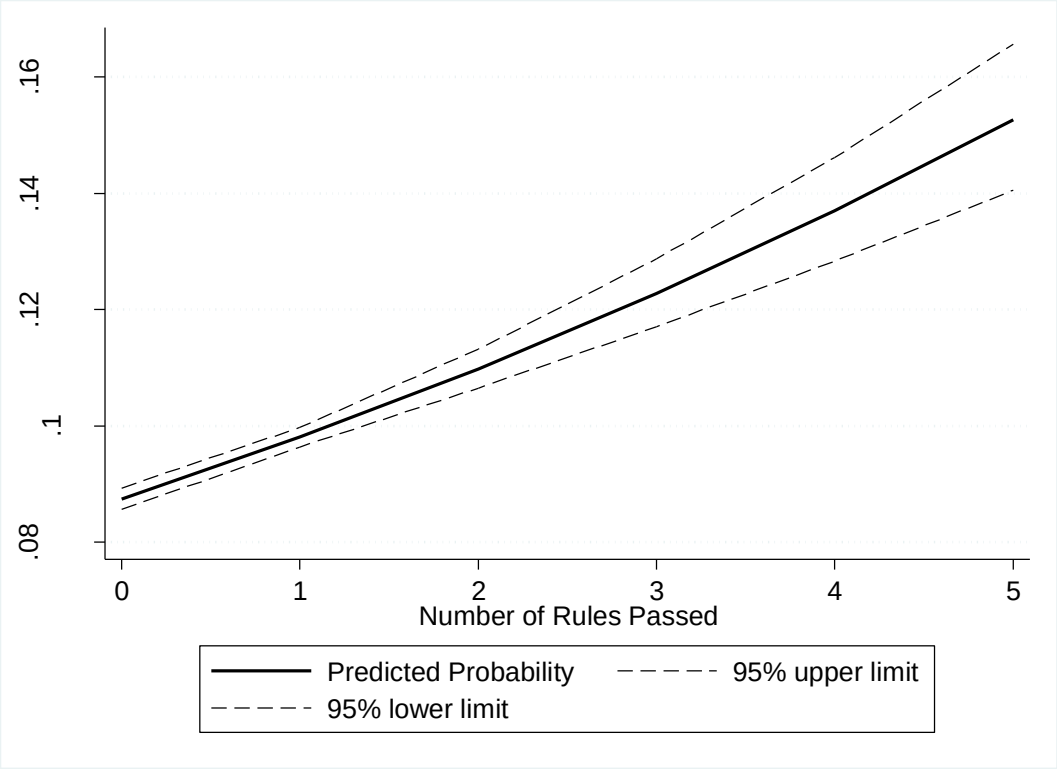


Figure 29: Predicted Probabilities

The final result for the modern durability model provides compelling support for the second core precept of my theory of legislative durability, which suggests that procedures which facilitate substantive compromise lead to durable law. Figure 29 shows that for every additional special rule Congress passes during its consideration of a bill, the likelihood that Congress will later repeal, or another branch omit, its provisions increases. Each of the unique indicators included in the modern durability model lends support to my hypotheses regarding the role of information, deliberation, and compromise in producing durable law. In the next section, I add a final indicator to the models for landmark durability

for lawmakers' votes for legislation at final passage. This is perhaps the best test of the degree to which compromise enables law to endure.

LANDMARK LEGISLATIVE DURABILITY (1973-2010)

The third and final set of models examine the determinates of durability for provisions within Mayhew's landmark pieces of legislation, enacted between 1973 and 2010. The models include 61,344 provisions. Without exception, all prior studies of legislative durability have adopted landmark legislation as their unit of analysis. My research departs from this trend by investigating the durability of all laws, and furthermore, all provisions within laws. I have chosen to model the durability of provisions within landmark legislation separately, partly to illustrate that the determinates of durability are no different for provisions within landmark laws and non-landmark laws, and partly because this allows me to include an indicator for the proportion of the House and Senate who vote 'aye' on final passage.

Indicators for Compromise

The models for historic durability and modern durability included various measures of the potential that lawmakers may reach a substantive compromise, including indicators for omnibus legislation, non-germane provisions, restrictive rules and conditions of unified, divided or polarized government. The landmark durability models examined in this section, include a more direct measure of compromise, final passage votes.

Size of Enacting Majorities

The proportion of lawmakers that vote for a law is the best estimate of the degree of compromise that preceded its passage, controlling for other factors such as, the use of

non-germane provisions and omnibus legislation. The greater the proportion of 'aye' votes, the greater the likelihood that the legislation and its constituent provisions represent a substantive compromise between the diverse preferences that characterize Congress. Readers will recall that I predicted a positive relationship between the size of a law's enacting coalition and the durability of its provisions.

Hypothesis 9: *Provisions within laws that garner a larger proportion of Congress' final passage vote will be more durable.*

I measure the **Proportion Voting 'Aye'** as the combined proportion of the House and Senate voting 'aye' on final passage of legislation.[19] I do not find support for this hypothesis in the bivariate context. The odds that a provision will be repealed or omitted increase by 7 percent for every unit increase in the ratio of legislators voting for 'aye,' or=1.07, p<.001. I anticipate that the direction of this effect will reverse once I have controlled for the effects of other determinants of durability.

Results

I present the results for landmark durability from 1973 to 2012 in the same manner as the previous two sections. Coefficient estimates have been exponentiated and are interpreted as odds ratios. The results for all three models are presented in Table 3. The results for the first model are presented as a forest plot in Figure 30.

[19] The denominator of the measure is the 535 possible voting members of the House and Senate.

Table 3: Determinants of Landmark Repeal and Omission (1973-2010), Logit Odds Ratios

	Rep & Omit	Repeal	Omission
Number of Policy Areas	1.013*	1.015*	1.023*
	-(0.01)	-(0.01)	-(0.01)
Formula One	0.753***	0.822***	0.694***
	-(0.03)	-(0.03)	-(0.04)
Number of Provisions	1.000***	1.000***	0.999***
	(0.00)	(0.00)	(0.00)
Proportion Voting 'Aye'	0.741**	0.726*	1.022
	-(0.08)	-(0.09)	-(0.18)
Opposite Unifed Governments	0.918***	0.930***	0.919**
	-(0.02)	-(0.02)	-(0.03)
Days Between Intro and Enact	1	1.000*	0.999***
	(0.00)	(0.00)	(0.00)
Last Two Months of Congress	1.121**	1.111*	1.145*
	-(0.04)	-(0.05)	-(0.07)
Number of Special Rules Passed	1.199***	1.160***	1.242***
	-(0.02)	-(0.02)	-(0.04)
Number of Committees	0.935***	0.943***	0.905***
	-(0.01)	-(0.01)	-(0.02)
Age of Policy Area	0.075***	0.134***	0.033***
	-(0.04)	-(0.08)	-(0.03)
Build up of Law in Policy Area	1.000*	1.000***	1
	(0.00)	(0.00)	(0.00)
Revised Title	1.319*	1.785***	0.258***
	-(0.15)	-(0.21)	-(0.08)
Counter	0.979*	0.989	0.968*
	-(0.01)	-(0.01)	-(0.01)
Constant	3.058e+18*	442600000	5.471e+27*
	-(5.59E+19)	-(9.49E+09)	-(1.65E+29)
Macroeconomics	0.906	1.349*	0.518***
	-(0.09)	-(0.16)	-(0.08)
Civil Rights, Minority Issues, and Civil Liberties	0.509**	0.465*	0.631
	-(0.13)	-(0.15)	-(0.23)
Agriculture	1.984***	2.481***	1.04
	-(0.16)	-(0.24)	-(0.14)
Labor and Employment	0.94	1.347*	0.372***
	-(0.11)	-(0.18)	-(0.09)
Education	3.959***	2.739***	4.388***
	-(0.33)	-(0.28)	-(0.52)
Environment	0.84	0.689*	1.119
	-(0.10)	-(0.11)	-(0.18)

Table 3, cont.

Energy	0.914	1.119	0.595**
	-(0.10)	-(0.14)	-(0.11)
Immigration	0.694*	0.769	0.562*
	-(0.10)	-(0.13)	-(0.15)
Transportation	2.336***	2.549***	1.777***
	-(0.18)	-(0.24)	-(0.21)
Law, Crime, and Family Issues	0.811*	0.873	0.692*
	-(0.08)	-(0.11)	-(0.12)
Social Welfare	0.835*	0.95	0.711**
	-(0.06)	-(0.09)	-(0.08)
Community Development and Housing	1.201	1.466**	0.777
	-(0.13)	-(0.19)	-(0.14)
Banking, Finance, and Domestic Commerce	0.764**	1.001	0.435***
	-(0.07)	-(0.11)	-(0.08)
Defense	1.801***	2.479***	1.001
	-(0.19)	-(0.32)	-(0.17)
Space, Science, Technology and Communications	0.515**	0.641	0.348**
	-(0.11)	-(0.15)	-(0.14)
Foreign Trade	0.749	0.821	0.653
	-(0.12)	-(0.15)	-(0.17)
International Affairs and Foreign Aid	1.543***	1.881***	1.054
	-(0.16)	-(0.23)	-(0.18)
Government Operations	0.882	1.242	0.510***
	-(0.08)	-(0.14)	-(0.08)
Public Lands and Water Management	1.082	0.851	1.528*
	-(0.14)	-(0.15)	-(0.29)
Pseudo R^2	0.091	0.061	0.108
Observations	61,344	61,344	61,344

* p<.05; ** p<.01; *** p<.001

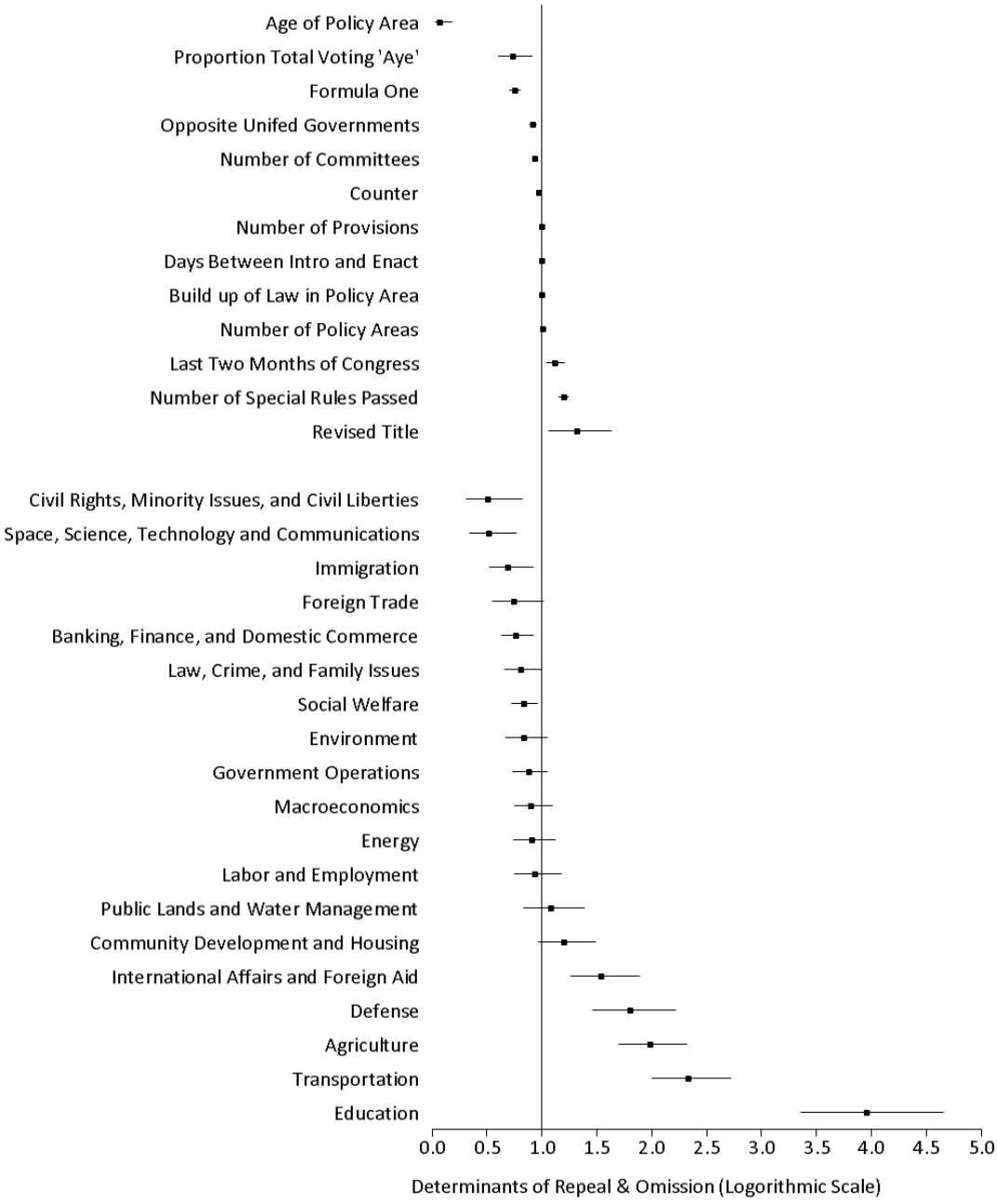


Figure 30: Forest Plot of the odds ratios for the determinants of provisions from landmark legislation ending by either repeal or omission (1973-2010).

A central finding for provisions from landmark legislation is that they are no different from other provisions. In general, the same variables that predict the durability of regular provisions, predict the durability of landmark provisions in the same direction and with similar magnitudes. Another important contribution of this model is that it estimates the impact of final passage votes on provision level durability.

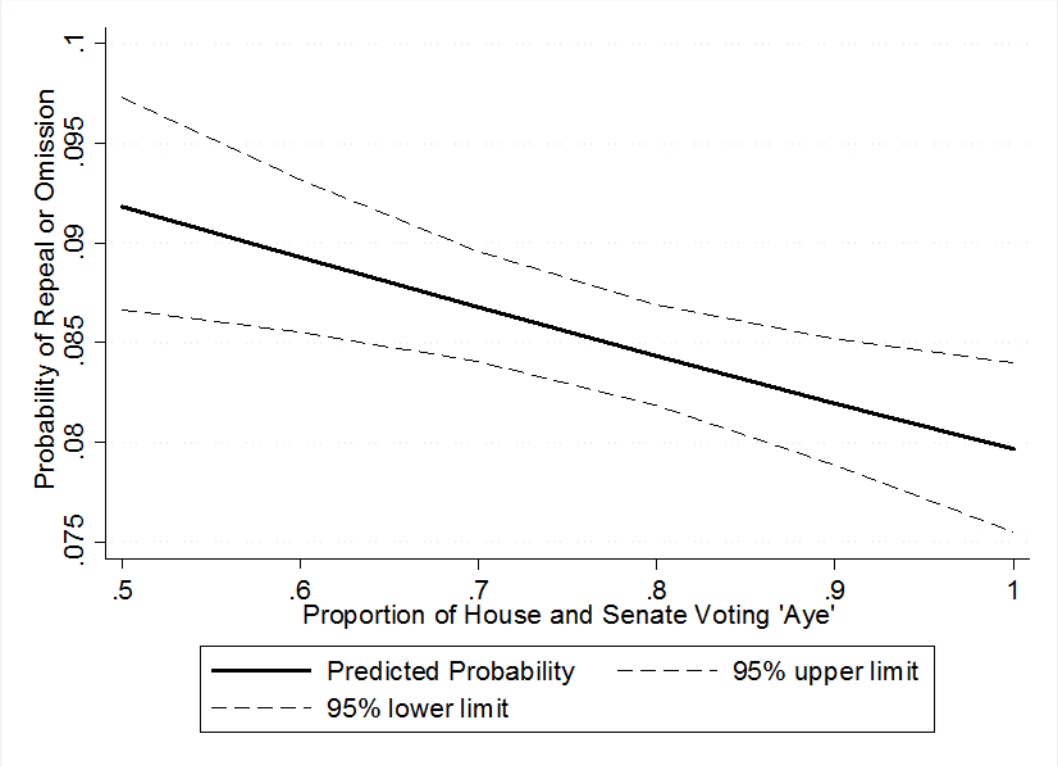


Figure 31: Predicted Probabilities

Figure 31 graphs the relationship between the proportion of the House and Senate voting 'aye' for legislation and the subsequent durability of its provisions. As the proportion of lawmakers for a piece of legislative increases, the durability of that legislation's provisions increase. In substantive terms, for every additional lawmaker who

votes for a law, there is a 1.5% decrease in the odds that a provision within that law will be repealed or omitted.

DISCUSSION

Across all models, historic, modern, and landmark, the preponderance of evidence suggests that the most durable provisions are referred to multiple House and Senate committees and benefit from unrestricted debate. Further, they are most often contained within non-omnibus legislation, germane to the core policy content of the legislation, and enacted after Congress has gained institutional experience in the relevant policy area. Additionally, the most durable provisions are enacted during periods of unified government, higher polarization, or by polarized, divided governments. Finally, the greater the number of lawmakers voting for a law, the more durable its provisions will be.

Discrepancies between the bivariate analyses associated with each indicator and the combined effect of the indicators across model specifications, suggests that no one factor, in isolation, is the cause of durable law. Instead, these factors work together to increase the durability of legislation.

On Information and Deliberation

These results suggest that an information search that takes advantage of the expertise and knowledge of members, staffs, and resources from multiple committees helps Congress craft higher quality and more durable legislation. Similarly, an open deliberative process, characterized by the inclusion of members' preferences on the floor and unfettered time for discussion of information and alternatives, produces more durable law.

On Compromise

When friction is highest, and government is at its most polarized and divided, is precisely when the legislature produces the most durable law. When government is unified, and polarization is low, the resulting law is more ephemeral. Ideologically cozy Republicans and Democrats in unified governments do not pass durable law. Ideologically distant and opposed parties in divided governments, do. Working together is hard, but it produces the most durable results. Similarly, the consideration of legislation under open rules that facilitate the incorporation of minority preferences enables congress to pass durable law.

On Omnibus Legislation

The passage of omnibus legislation may allow Congress to "get things done." However, it results in less durable law. These results indicate that the path toward more durable law is paved by the enactment of policy focused statutes, whose provisions garner roughly equal support from the members of the enacting coalition. They also call into question the value of logrolling, a practice in which lawmakers trade support for their preferred bills. There may be little value for a legislator to gain a preferred provision if that gain cannot be preserved over the long haul.

Similarly, the inclusion of non-germane provisions in legislation often makes sure that they are enacted along with a proposal that the majority supports, however, in the long-run they are less durable than the provisions belonging to the core policy area of a law. Taken together, the results demonstrate that enacting policies without regard to their individual merit results in ephemeral law.

Are the Determinants of Durability different for Repeals and Omissions?

For the most part, no. The same factors that increase legislative durability when the termination of provisions is measured by repeal increase the durability of provisions when the termination point is measured by omission. In both cases the most durable provisions are referred to multiple committees, considered for longer periods in Congress, contained within non-omnibus legislation, germane to the core policy content of the legislation, and enacted after Congress has gained institutional experience in the relevant policy area. In other words, provisions that avoid both repeal and omission are more likely to have emerged through a policy process that produces high quality, bipartisan and durable public policies. Therefore, these provisions are less likely to be nullified by any of the three branches of government, using any of the means available to dismantle extant law.

Although most determinants of durability are the same across model specifications with different dependent variables (repeals vs. omissions), provisions that avoid being omitted differ in two key respects. First, they are normally not omitted as the result of Congress' positive law codification efforts. As discussed in Chapter 4, when Congress reviews and enacts whole titles of the United States Code, and their accompanying structure, as positive law, they commonly repeal or omit up to 50 percent of a title's provisions in the process. The odds ratios for the omitted law models reported in Tables 1, 2, and 3, indicate that provisions are more durable, in terms of omissions, when they are part of a revised title (positive law). Why would provisions face a lower risk of being omitted if they are part of a revised title?

My answer involves three propositions. The first is that when Congress enacts a title as positive law they are more likely to repeal its provisions than omit them. Second, when Congress enacts a title as positive law they are more likely to repeal lower quality provisions or provisions that are no longer implemented. Third, as a result of most of the

lower quality and unimplemented provisions having already been repealed, there are few provisions left that inspire Congress, the Courts or the Executive to target them for omission. Put succinctly, low quality and unimplemented provisions in revised titles have already been repealed and are therefore no longer available to be omitted.

The second key respect in which determinants of durability differ is in the effect of divided and unified governments. Contrary to my theoretical expectations, in models for repeal, I have consistently found that unified governments pass the most durable provisions. However, this finding flips direction if the dependent variable is omissions of law. Unified governments enact the least durable provisions when termination is measured by omission from the legal corpus. This means that provisions enacted by unified governments are more likely to have their funding cut, be amended out of existence, be sunset, be ruled unconstitutional, or be nullified through lack of executive enforcement.

As I argued in Chapter 3, unified governments are among the most perilous threats to durability because they empower the majority to forgo compromise with the minority. It is possible that instead of repealing provisions enacted by ideologically dissimilar unified governments, subsequent coalitions in Congress, bureaucrats, and the courts find other ways to dismantle these enactments. Specifically, subsequent political actors may nullify provisions from unsatisfactory status quo policies under the radar, using omissions. Such a strategy would enable subsequent political actors to modify policy to match their preferences without exposing them to the political scrutiny that accompanies ferrying a formal repeal through Congress.

A Double-Edged Sword: Divided and Unified Governments

The effect of divided government on legislative durability, particularly with regard to repeals, is one of the only results in this chapter that consistently went against my expectations. Contrary to my expectations, the preponderance of evidence suggests that unified governments pass the most durable provisions, despite the fact that majorities under unified governments have no incentive to compromise. This finding indicates that there are other forces at work, not yet identified in my theoretical framework, which conspire to increase the durability of the provisions enacted by unified governments.

Specifically, it may be the case, as Maltzman and Shipan have suggested, that unified governments produce laws that are more legally consistent, have more self-executing provisions, and are better entrenched in the bureaucracy (2008). All of these characteristics would reduce the need for lawmakers to revisit enacted policy and hence lead to greater durability. Despite the inability of my theory to account for the fact that unified governments pass policy that is less likely to be repealed, I nonetheless believe that my theoretical perspective can tell us something about differences in the quality of deliberation and compromise during periods of unified and divided government.

Since the genesis of our modern political parties, divided governments have predominated. Fifty-eight percent of the governments since reconstruction have been divided. To get things done, divided governments tend to rely on the very procedures that produce the least durable legislation. They are more likely to pass omnibus bills, which contain more provisions, and address a greater number of policy areas, $r=.20$, $p<.001$. And they are more likely to let legislation linger under cursory examination until the rush to pass bills in the final two months of a Congress, $r=.07$, $p<.001$. By adopting these strategies, divided governments stymie their ability to gather information, deliberate and compromise.

As I have shown in this chapter, the result of Congress adopting these procedures is less durable law across all modes of nullification.

Unified governments have also adopted procedures that reduce the durability of legislation. Despite their position of consolidated executive and legislative powers, parties at the head of unified governments are more likely to pass restrictive rules to enact their legislative agenda $r=.2$, $p<.001$. A consistent finding throughout this chapter has been that the use of restrictive rules reduces the durability of law, regardless of the mode of nullification.

Thus, unified and divided governments are two edges of one sword. While unified governments enact provisions that are less likely to be repealed, divided governments enact provisions that are less likely to be omitted. Polarized, divided governments enact provisions that are less likely to be repealed. The majority party within a unified government is more likely to pass restrictive rules, while lawmakers in divided government are more likely to enact omnibus legislation and rush to pass bills in the last two months of a congress. These findings indicate that political conditions are not the most important factors for legislative durability.

Good Proxies versus Better Proxies

Conditions of government (unified, divided, polarized) serve as proxies, as they do in all political science research, for processes occurring within government. For my purposes, they have served as proxies for the probability that lawmakers are working together and compromising. Ultimately, I am less interested in the mediated effect of these proxies on the durability of legislation, than I am in the more direct effects of committee referrals, truncated debate, omnibus legislation, non-germane provisions, restrictive rules

and vote totals. These are better proxies or more direct measures of what is actually happening in Congress than are conditions of government. I suspect that because these variables are closer to my object of inquiry, their effect on the durability of provisions is clear and consistent across all statistical analyses in this dissertation. Conversely, the effects of conditions of government are more varied and less consistent.

Chapter 6: Durability Over Time

"Without a deep understanding of time, you will be lousy political scientists, because time is the dimension in which ideas, institutions, and beliefs evolve" (North 1999). Time is also the dimension in which laws evolve, change or die. The Congress that passes a law is unlikely to be the one that may ultimately decide its fate. The public that strongly supports Congress' original enactment may not be around to support it decades later. Circumstances on the ground and the context in which policy is implemented undoubtedly change over time. One of the keys to durability is a policy's ability to weather significant changes on all these fronts.

In the last chapter, I relied on dichotomous indicators for the repeal or omission of provisions to mark their termination. In this chapter, I apply the data I gathered on the timing of repeals to model the durability of provisions using survival analysis. I first describe common applications of survival analyses and their suitability for modeling how long provisions of law last before Congress repeals them. I then describe the events, unfolding over time, that I expect affect the durability of provisions. In particular, I examine switches in party control of the various branches of government and changes in the public's preferences for more conservative or more liberal public policies.

SURVIVAL ANALYSIS

Duration or survival models originated in biostatistics and are most commonly used by medical researchers to predict how long subjects survive before they die (if death is observed). Terms like "death" and "termination" are natural for analysis of survival data in the medical context. In the context of legislative durability, the purpose of using survival analysis is to test why certain provisions are at a higher risk of experiencing death through

repeal than are others and to precisely model the timing of these events. Due to the difficulty of systematically identifying exact dates of nullification for omitted law, I only include repeals in this portion of my analysis. Repeals account for seventy percent of all nullifications of federal law, and omissions the remaining thirty. So focusing only on repeals still captures the bulk of nullification activity.

To conform my dataset on the durability of provisions to the requirements of survival analysis, I transformed my dataset on the timing of repeals into its "long" form with multiple records for each provision. Specifically, I created a separate data record for each provision and each subsequent congress. The resulting dataset contains 4,029,967 unique provision-congress dyads. As a result of this transformation, I can include explanatory variables that change over time, or in this case, congresses, for each of these dyads. I am now able to model the effects of changes in control of government or the public's mood on the timing of repeal for particular provisions. Indicators that vary over time are often called time-varying covariates, indicated in this chapter by "**(tvc)**" following their substantive name to differentiate them from indicators that are contemporaneous with a law's enactment, which I explored in the last chapter.

Before discussing time-dependent determinants of durability, it is helpful to visualize the raw durability of the federal corpus. Figure 32 plots the daily probability of survival for all provisions of federal law. This contour of probability is called a hazard function. Each point on the curve specifies the instantaneous rate (probability) at which a provision will experience repeal, given that it has survived a given number of days already. For example, a provision that is 40,000 days old, or approximately 110 years old, faces little more than a five percent probability of survival. This probability decreases as the provision continues to age. In general, provisions face a greater risk of repeal the longer

they've been on the books. The average time between enactment and repeal is precisely 38 years and 30 days.

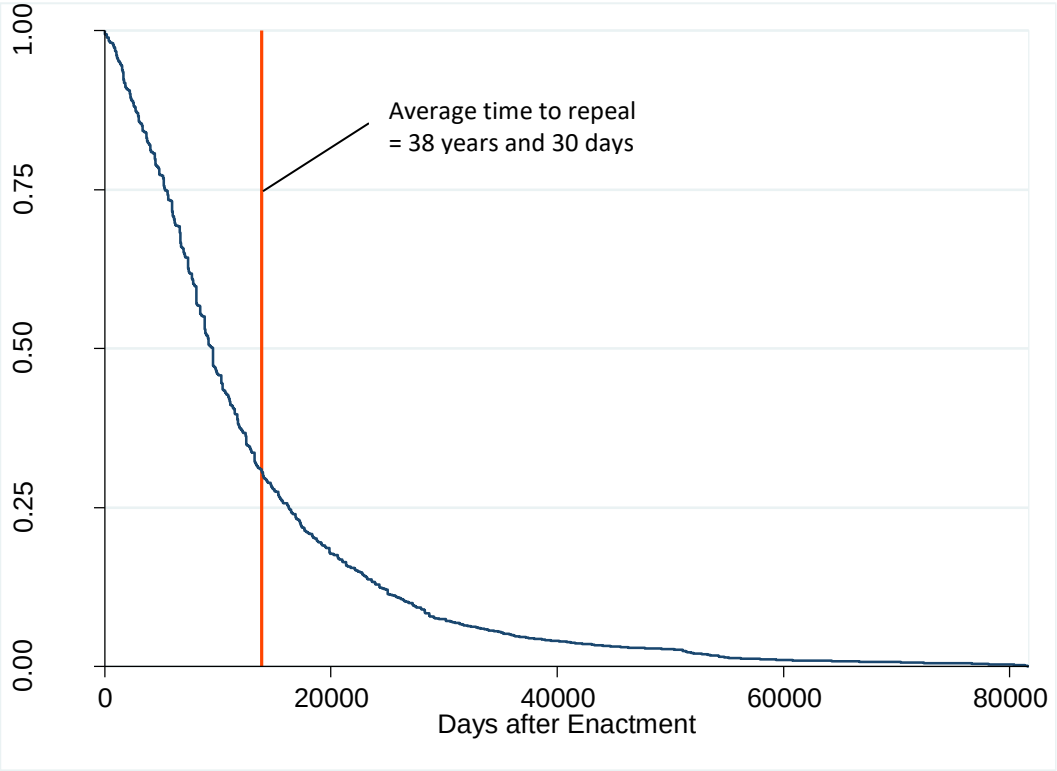


Figure 32: Kaplan Meier Survival Estimate for Repeals (1789-2012). Provisions face a greater risk of repeal the older they are. The average time between enactment and repeal is 38 years and 30 days.

This survival curve represents the time-dependent probability of repeal for the average provision in the United States legal corpus. The remainder of this chapter is devoted to discovering how systematic characteristics of provisions, the laws they belong to, their enacting coalition, subsequent coalitions and the American public's mood affect the survival of individual provisions.

Shifts in Party Control of Individual Branches of Government

In the prior chapter's logit models, I relied on a count of opposite unified governments in subsequent congresses to account for the effect of changes in control of government on the durability of provisions. As readers will recall, my prediction for the nature of this relationship was expressed in hypothesis 12.

Hypothesis 12: *Provisions within laws enacted by a unified government face an increasing risk of repeal or omission with each subsequent congress in which the opposing party enjoys unified control of government.*

I found that the greater the number of subsequent congresses in which the opposing party enjoys unified control of government, the more likely a provision is to be repealed. In this chapter, I replace that static count of unified governments with a time-varying covariate, which identifies subsequent congresses that are controlled by the opposing party, **Opposite Coalition Unified Government (tvc)**. In addition to testing hypothesis 12 in the context of a duration model, I propose and test four additional sub-hypotheses associated with party control of government, 12A, 12B, 12C, and 12D. Each of these sub-hypotheses deal with aspects of shifts in control of particular branches of government over time that resisted empirical investigation in the last chapter, but I am able to investigate using duration analysis in this chapter.

The prior chapter's results showed that provisions enacted by unified governments face a higher risk of repeal when the opposing party enjoys unified control of government in subsequent congresses. This risk increases with each additional congress during which the opposing party retains control of both the executive and legislative branches. While these results provide an important insight into the durability of provisions enacted by unified governments, they do not address the dynamics of the durability of provisions enacted by divided governments.

Conditions of divided government have become increasingly common since the 1970s. To better understand how party control of the different branches of government affects durability, I propose three additional sub-hypotheses, in which I posit relationships between switches in party control of the individual houses of Congress and the Executive on the durability of provisions. The underlying theoretical insight motivating these predictions is that when political parties gain control of part of government they are more likely to attempt to repeal provisions enacted by the rival party that previously enjoyed control of that part of government. This means that the durability of provisions from enacting congress is conditioned by which party controls the House, the Senate, or the Executive in subsequent congresses. This proposition leads to three specific hypotheses regarding changes in party control of the executive and legislative branches.

Sub-Hypothesis 12A: *Provisions within laws enacted by a party in control of the House will be more likely to be repealed by subsequent congresses when the opposing party controls the House.*

Sub-Hypothesis 12B: *Provisions within laws enacted by a Democratic Senate will be more likely to be repealed by subsequent congresses with a Republican Senate, and vice versa.*

Sub-Hypothesis 12C: *Provisions within laws enacted by a Democratic President will be more likely to be repealed by subsequent congresses with a Republican President, and vice versa.*

To clarify, I expect that provisions within laws enacted by a Democratic House, Senate, or President will be more likely to be repealed by subsequent congresses with a Republican House, Senate, or President, respectively. Conversely, I expect that provisions

within laws enacted by a Republican House, Senate, or President will be more likely to be repealed by subsequent congresses with a Democratic House, Senate, or President, respectively. In the models presented in this chapter, I have included dichotomous time-varying indicators for shifts between the governing party for the House, Senate and President for the enacting Congress and all subsequent Congresses. These are named **House Opposite Party (tvc)**, **Senate Opposite Party (tvc)**, and **President Opposite Party (tvc)**.

I have also included dichotomous indicators for two chamber and one chamber switches between the parties. The variable for a one chamber switch indicates a single chamber of Congress changed hands while the variable two chamber switch indicates both chambers changed hands. Ragusa and Birkhead include a similar indicator in their models and find some evidence that "policies enacted by the minority in prior congresses face a greater risk of repeal compared with policies enacted by the current majority," although their findings are largely conditional on the "majority's ideological cohesion and distance from the minority party" (2015). These variables are named **One Chamber Switch (tvc)** and **Two Chamber Switch (tvc)**.

Historical Minority Status

In chapter 3, I argued that when control of either or both branches of Congress changes, the newly empowered party is anxious to see their policies considered and, hopefully, enacted. To add to this, newly empowered majorities are similarly anxious to dismantle the policies of the opposing party. The longer a newly minted majority has been out of power, the more urgent and non-negotiable both of these aspirations become. They aspire to pass their policies and dismantle their opponent's. Consequently, I expect that a

majority party's recent experience in the minority will condition their propensity to repeal existing provisions. Specifically, repeals are more likely in congresses when a new majority seizes control after a long period out of power.

Sub-Hypothesis 12D: *Repeals are more likely in congresses when a new majority seizes control after a long period out of power.*

I calculate **Historical Minority Status (tvc)** as a count of the number of prior Houses the opposing party controlled before the current party's ascendency to a majority in the House. For example, the variable is coded "20" for Republicans in the 104th Congress because Democrats had controlled the House for the last 20 congresses, while it is coded "6" for Democrats in the 110th Congress because Republicans had controlled the House for the prior 6 congresses.

The Public Mood

Early scholarship on legislative durability, based on case studies, found that the public's support for a policy bolstered its durability (Patasknik 2008 2012, Glazer 2012). Because I am investigating the systematic determinates of durability for a far greater number of laws than these studies explored, I am unable to account for whether or not the public's support for particular policies sustains them after enactment. However, I can account for the effect of global shifts in the public's preferences for a more or less active federal government.

Congress forms the electoral connection between constituents, conditions in the outside world and government action. It is the dynamic intermediary through which citizens' preferences are translated into the passage or repeal of law. This connection is predicated on the assumption that as the public's preferences for government policy

evolves, they will elect Representatives and Senators who can credibly represent those preferences in their respective chambers. Changes over time in the ideological composition of Congress, especially after elections, support this assumption (Poole and Rosenthal, 2000), as do findings from Stimson et. al. (1995), which show that policy outputs respond dynamically to aggregate public preferences for more or less government over time and across different issues: "provision of healthcare," "cuts in welfare spending," "getting tougher on crime," and so on.

Stimson and his coauthors describe public mood, as "the major dimension underlying expressed preferences over policy alternatives in the survey research record. It is properly interpreted as left versus right—more specifically, as a global preference for a larger, more active federal government as opposed to a smaller, more passive one across the sphere of all domestic policy controversies" (1995, p. 548). In their 1995 article, the authors found that not only does mood influence the liberalness of government decisions, it also accounts for changes in the proportion of Republicans and Democrats winning seats in the House of Representatives (Stimson et. al.).

In addition to influencing the election of representatives and the liberalism of public policy, the global preference for more or less government, which political scientists call the public's mood, influences the incentives Congress has to repeal provisions of law. Conservatives view increased congressional productivity as evidence of a more intrusive and active federal government. One way that lawmakers may respond to a conservative shift in the public's preferences for public policy is to repeal provisions of law and thereby shrink government. While serving as Speaker of the House, John Boehner summarized this philosophy when he suggested that Congress "ought to be judged on how many laws we repeal" (Cillizza and Blake 2013).

My expectation is that Congress will respond to the public's preferences for more or less government by adjusting their level of repeal activity, more repeals for a more conservative public mood and fewer repeals for a more liberal public mood.

Hypothesis 15: *Provisions will be <u>less</u> durable as the public's mood becomes more conservative after enactment.*

In the following models, changes in the public's mood are measured using the output of Jim Stimson's biennial algorithm for amalgamating various domestic policy questions, which he calls, "Public Policy Mood." Higher values of this variable indicate a more liberal public mood, while lower values indicate a more conservative public mood. For a full explanation of the construction of the measure see Stimson 2014, Stimson et al. 1995, or Stimson 1991. This indicator is named **Public Mood (tvc)** in the figures and tables to follow.

Other Indicators

In addition to the indicators for shifts in party control of the individual branches of government and the public's mood, which are my primary focus in this chapter, I also investigate other time-varying determinates of durability, described below.

Congressional Productivity

Congresses vary widely in their productivity, with some enacting many provisions and others enacting relatively few. This is evident in Congress' total legislative output from the 1st to the 112th Congresses in Figure 33.

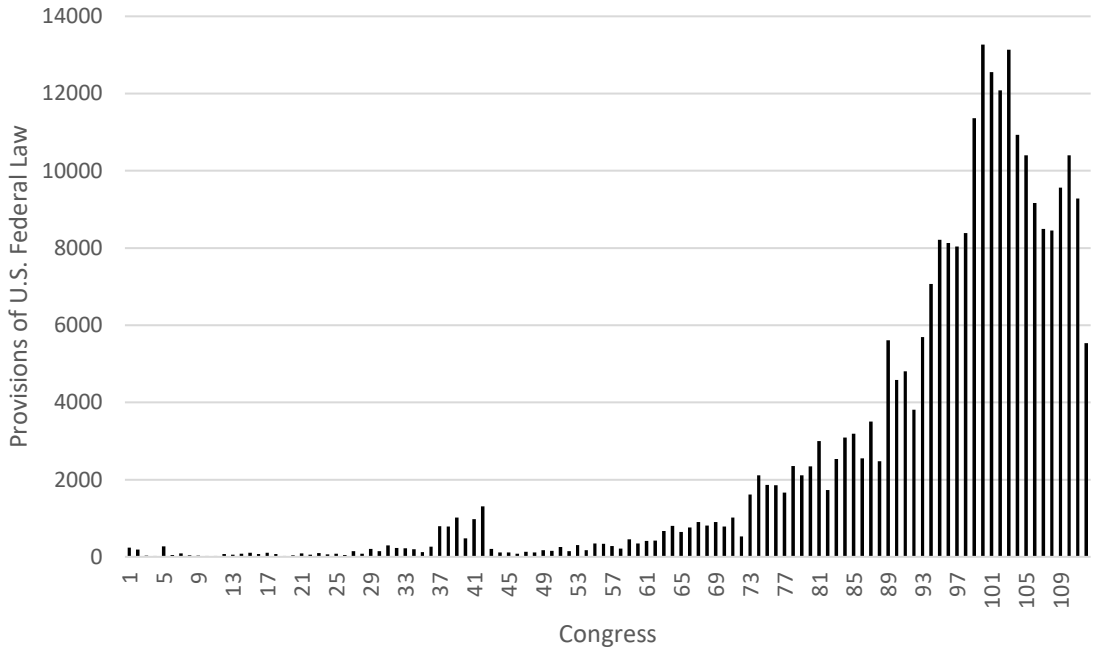


Figure 33: Congressional Productivity (1st-112th Congress).

Because Congress must pass a law to repeal provisions, each congresses' productivity is necessarily positively related to their repeal activity. Congressional productivity, measured here as the number of provisions a Congress enacts, may also be related to their repeal activity proportionally. That is a Congress that enacts many laws may also repeal a greater number of provisions than Congresses that enact fewer laws. To account for variations in the productivity of Congresses and the positive effect I anticipate it will have on their propensity to repeal provisions, I have included a time-varying covariate for the number of provisions each Congress enacts. This indicator is named **Productivity Over Time (tvc)** in following figures and tables.

Positive Law Codification Efforts

Readers learned in Chapter 4 about a little-known procedure called positive law codification, in which Congress reviews and enacts whole titles of the United States Code, and their accompanying structure, as positive law. I showed that Congress, on average, repeals or omits 50 percent of a title's provisions when they attempt to enact it as positive law. Viewed over time, this means that Congresses that enact titles into positive law are responsible for a far greater percentage of repeals than Congresses that do not enact titles as positive law. Figure 34 plots the passage and repeal activity of every Congress since the American founding. Within this figure, three separate positive law codification efforts are identified, each of which coincides with substantial increases in the number of provisions that Congress was responsible for repealing.

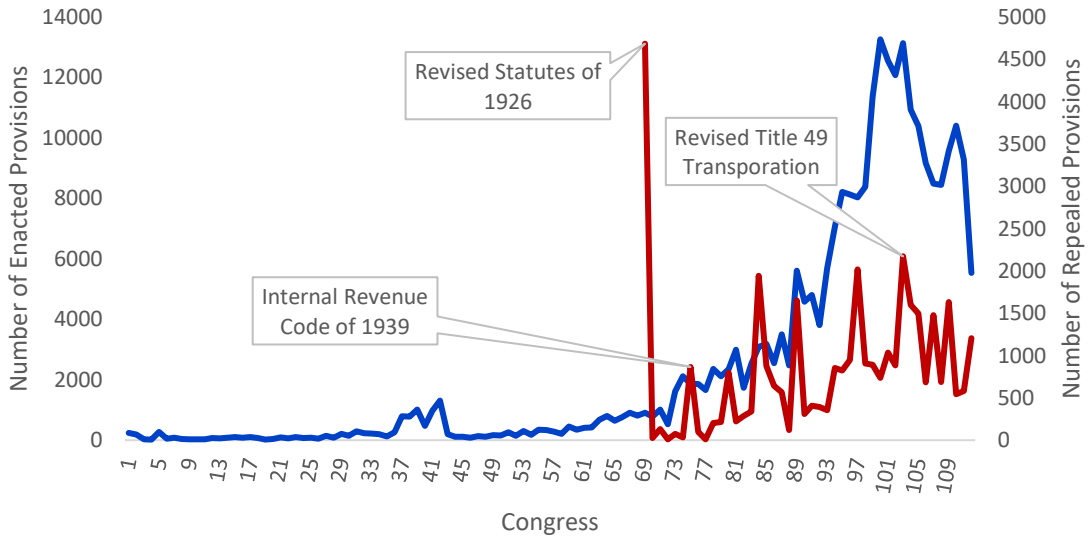


Figure 34: Passage and Repeal Activity by each Congress (1789-2012). The above graph compares the rates at which Congress has engaged in both the passage and repeal of legislation over time. The 69th Congress was the first to formally record its repeals of past provisions when it enacted the Revised Statutes of 1926.

Although not all positive law codification efforts result in Congress enacting the title under consideration as positive law, each attempt to enact a title as positive law has contributed to a substantial increase in the number of provisions repealed by Congress in the year they were considered. Even though the 1926 positive law codification effort did not result in Congress converting all of the Code into positive law, as was its original intent, it nonetheless provided Congress with an opportunity to review and reconsider past legislation. After it reviewed the state of the Code, Congress repealed almost 5000 provisions.[20] Similarly, in the year Congress undertook to positively codify Title 26, the Internal Revenue Code, it repealed almost 1000 provisions and in the year Congress codified Title 49, Transportation, it repealed almost 2500 provisions. Each time Congress reviews existing law with a view toward codifying it as part of positive law, it repeals a significant proportion of the provisions it reviews.

As a result of the increased repeals that accompany positive law codification efforts, I have included a time varying dichotomous indicator variable for those congresses that attempted to enact one or more titles of the Code as positive law. This indicator is named **Revised Title Codification (tvc)** in the tables and figures in this chapter.

Polarization and Divided Government

In addition to the variables described above, I also include indicators for conditions of divided government and polarization over time. These indicators are named **Divided Government Over Time (tvc)** and **Polarization Over Time (tvc)**, respectively.

[20] The 1926 positive law codification effort marked the first time Congress recorded repealing provisions of existing law. While Congress undoubtedly repealed provisions of law prior to this date, no record of those repeals exist in the United States Code.

MODELING DURABILITY OVER TIME

I estimate three Cox proportional hazard models where the dependent variable captures whether the provision was repealed and at what point in time (Allison 2014, Box-Steffensmeier and Jones, 2004). The first model has the broadest historical scope, modeling legislative durability from 1879 to 2010. It includes 3,471,291 provision-congress dyad observations. The second model is more narrowly focused on modern lawmaking, 1973-2010, and allows for the inclusion of indicators related to the consideration of bills before enactment. It includes 1,600,297 provision-congress dyad observations. The last model only includes provisions within Mayhew's landmark pieces of legislation from 1973-2010. It includes 528,396 provision-congress dyad observations. Although I report the results for landmark provision model, I do not discuss its findings because they corroborate findings from the other two models.

All models exclude provisions from the last Congress in the dataset, the 112th Congress (2011 and 2012), because no "model time," which is measured in individual congresses, has elapsed between their enactment and the termination of the dataset at the end of the 112th Congress. Additionally, the reference category for the policy content of provisions is the PAP major topic, health. I choose health as the reference category because it occupies the middle of the distribution when all twenty policy areas are arrayed by their provisions' average durability. Thus, dichotomous indicators for the policy content of provisions should be interpreted with reference to this category.

Parameters for all three models are presented as hazard ratios in Table 4. Coefficients with hazard ratios lower than 1 decrease the likelihood of repeal, whereas coefficients greater than 1 increase the likelihood of repeal. If a hazard ratio is 1.40, then a one-unit increase in the variable will increase the likelihood of reversal by 40 percent. Conversely, a one-unit increase in a variable with a hazard ratio of 0.40 will decrease the

hazard by 60 percent. To borrow an example from the first model, for every additional policy area a law addresses, its provisions face an increase in their likelihood of reversal by 3.9 percent.

Table 4: Determinants of Repeal, Hazard Ratios

	1879-2010	1973-2010	Landmark
Number of Policy Areas	1.039***	1.012***	1.013
	(0.00)	(0.00)	(0.01)
Formula One	0.951***	0.829***	0.785***
	(0.02)	(0.02)	(0.04)
Number of Provisions	1.000***	1.000***	1.000***
	(0.00)	(0.00)	(0.00)
Polarization	0.964	0.588	0.539
	(0.07)	(0.21)	(0.35)
Divided Government	1.410***	1.859***	3.362***
	(0.08)	(0.21)	(0.73)
Divided X Polarization	0.610***	0.352***	0.176***
	(0.06)	(0.06)	(0.06)
Last Two Months of Congress	1.037	1.061*	1.198***
	(0.03)	(0.03)	(0.06)
Age of Policy Area	7.221***	0.159***	0.014***
	(0.69)	(0.05)	(0.01)
Build up of Law in Policy Area	1.000***	1.000***	1.000***
	(0.00)	(0.00)	(0.00)
Number of Special Rules Passed		1.084***	1.083**
		(0.02)	(0.03)
Number of Committees		1.017***	0.973
		(0.01)	(0.02)
Days Between Intro and Enact		1.000	1.000***
		(0.00)	(0.00)
Proportion Voting 'Aye'			0.881
			(0.13)
Macroeconomics	0.849***	0.552***	0.913
	(0.04)	(0.04)	(0.13)
Civil Rights, Minority Issues, and Civil Liberties	0.365***	0.506***	0.693
	(0.04)	(0.09)	(0.26)
Agriculture	0.616***	0.918	2.614***
	(0.02)	(0.06)	(0.30)
Labor and Employment	1.08	1.677***	2.001***
	(0.06)	(0.11)	(0.29)
Education	1.587***	1.992***	3.204***
	(0.06)	(0.11)	(0.37)
Environment	0.242***	0.369***	0.663*
	(0.02)	(0.03)	(0.13)
Energy	0.362***	0.617***	1.231
	(0.02)	(0.05)	(0.18)

Table 4, cont.

Immigration	1.115	0.453***	0.455***
	(0.07)	(0.06)	(0.11)
Transportation	1.112**	1.632***	3.188***
	(0.04)	(0.08)	(0.33)
Law, Crime, and Family Issues	0.425***	0.5	0.938
	(0.02)	(0.04)	(0.14)
Social Welfare	0.647***	0.742***	1.066
	(0.03)	(0.04)	(0.12)
Community Development and Housing	.616***	1.148	2.034***
	(0.03)	(0.10)	(0.31)
Banking, Finance, and Domestic Commerce	0.518***	0.435	1.091
	(0.02)	(0.03)	(0.14)
Defense	1.591***	0.812**	1.282
	(0.06)	(0.06)	(0.19)
Space, Science, Technology and Communications	0.400***	0.678***	0.667**
	(0.03)	(0.07)	(0.20)
Foreign Trade	0.380***	0.368***	0.716
	(0.02)	(0.04)	(0.19)
International Affairs and Foreign Aid	0.706***	1.104	2.159***
	(0.03)	(0.08)	(0.32)
Government Operations	1.142***	0.678***	1.324*
	(0.04)	(0.05)	(0.18)
Public Lands and Water Management	0.226	0.25	0.906
	(0.01)	(0.03)	(0.20)
Productivity Over Time (tvc)	1.000***	1.000***	1.000***
	(0.00)	(0.00)	(0.00)
Unified Coalition Opposite Party (tvc)	1.098**	0.85*	1.324*
	(0.04)	(0.06)	(0.18)
House Opposite Party (tvc)	1.120***	0.935	0.672***
	(0.02)	(0.04)	(0.04)
Senate Opposite Party (tvc)	0.936***	1.03	1.134*
	(0.02)	(0.03)	(0.06)
President Opposite Party (tvc)	0.988	1.052	0.938
	(0.01)	(0.03)	(0.05)
Divided Government Over Time (tvc)	1.197***	1.083**	1.086
	(0.02)	(0.03)	(0.05)
Polarization Over Time (tvc)	0.052***	3.245**	75.625***
	(0.00)	(1.33)	(58.47)
Historical Minority Status (tvc)	1.083***	1.068***	1.086***
	(0.00)	(0.01)	(0.01)

Table 4, cont.

Two Chamber Switch (tvc)	0.409***	0.323***	0.386***
	(0.02)	(0.03)	(0.06)
One Chamber Switch (tvc)	1.114***	1.044***	1.107
	(0.02)	(0.03)	(0.06)
Revised Title Codification (tvc)	2.137***	1.276***	1.374***
	(0.03)	(0.04)	(0.08)
Public Mood (tvc)		0.963***	0.966**
		(0.01)	(0.01)
Observations	3,471,291	1,600,297	528,396

* p<.05; ** p<.01; *** p<.001

It is easier to quickly identify the direction and magnitude of coefficient effects if they are presented graphically. In the next two sections, I visualize and discuss the results of the first and second model separately before highlighting consistent or inconsistent findings across the model specifications. Readers should continue to refer to the numerical coefficient estimates in Table 4 when effect sizes are too small to visually discern or to compare the direction and magnitude of effects across models.

Historic Legislative Durability (1879-2010)

The hazard ratios for the first model are presented within a forest plot in Figure 35. As in the last chapter, each square represents the coefficient estimate for the variable listed to its left. Estimates falling to the left of the line on the x-axis, indicate that provisions are less likely to be repealed. Estimates falling to the right of the line on the x-axis, indicate that provisions are more likely to be repealed. The line bisecting each square represents the upper and lower bounds of the 95 percent confidence interval for the estimate. If the lines that bisect the point estimates cross the midline, marked by 1 on the x-axis, then the result is statistically insignificant at the .005 level.

Figure 35: Forest Plot of the hazard ratios for the determinants of repeal (1879-2010).

Most of the effects for variables that measure phenomena that are contemporaneous with or occur prior to enactment (roughly the top third of the forest plot) are in the same direction as those reported in Chapter 5's logit models covering the same period. Even under the alternate specification of a survival model, the results are functionally equivalent. The most durable provisions are germane to the core policy content of a law, are within laws that address fewer policy areas, and are enacted by either polarized divided governments or unified governments. The effects of polarization and truncated consideration of a law during the last two months of a congress are in the same direction as prior models, but are statistically insignificant. The effect for the age of policy area is the only variable whose direction has been reversed. The result suggests that the more experience Congress has in a policy area, the more likely provisions enacted in that area are to be subsequently repealed. Consonant with all other models, neither the build-up of extant law, nor the number of provisions a law contains, effect the durability of provisions.

The effect of policy area on durability remains strikingly consistent with earlier findings, although the rank order has been shuffled, slightly, in comparison with the rank orderings produced by Chapter 5's logit models. Despite some reordering, the most durable policy areas are still environment, law and crime, public lands and water management, energy and civil rights. The least durable policy areas are still government operations, transportation, defense, and education. When examining the full span of U.S. history, older functions of government appear to be among the least durable. Although, as noted in Chapter 4, older functions of government have amassed a greater number of provisions over a longer period, giving Congress more content to work with and more time to repeal their provisions. The only consistent exception to this rule is the domain of education. As the subsequent models also attest, provisions dealing with education are among the least

durable, regardless of the model specification. In general, the effects visualized in the top two-thirds of Figure 35 confirm findings from the previous empirical chapter.

The effects of time-varying covariates, visualized in roughly the bottom third of the figure, are the main focus of this chapter. As readers will recall, I had five predictions for the effect of control of government and its various branches on legislative durability, expressed in hypotheses 12, 12A, 12B, 12C, and 12D. In accordance with my prediction in hypothesis 12, subsequent unified governments are more likely to repeal provisions that were enacted when the opposing party controlled government. If a unified democratic government enacts a law, its provisions face a greater risk of being repealed by subsequent governments controlled by Republicans, and vice versa.

Corresponding with my prediction in hypothesis 12A, subsequent Houses are more likely to repeal provisions that were enacted when the opposing party controlled the House. If a democratically controlled House enacts a law, its provisions face a greater risk of being repealed by subsequent congresses in which Republicans control the House, and vice versa. Contrary to my expectations in hypotheses 12B and 12C, the same dynamic does not apply to oscillations in control of the Senate or Executive.

I also find evidence that a switch in control of one chamber precipitates increased repeals, but a simultaneous switch of both chambers does not. It is possible that this dynamic is driven by the fact that when a party gains control of two chambers simultaneously they are more focused on enacting their agenda in a favorable political climate, than dismantling prior policies. When a party only gains control of one chamber they are not riding the wave of legislative success that often accompanies acquiring control of both chambers simultaneously. Thus, they may focus their efforts on dismantling the other party's policies, rather than passing their own. For example, in 2015, Republicans gained control of the Senate. During this period, Senator Rubio began quietly inserting

repeals of provisions of the Patient Protection and Affordable Care Act (PPACA) into omnibus government spending bills, thereby slowly chipping away at President Obama's signature enactment (Thiessen, 2015). This finding complements the result that divided governments engage in more repealing activity than unified governments.

The final indicator dealing with switches in control of government, relates the passage of time and the majority's motivation to repeal policy. As expressed in hypothesis 12D, I expect that when the majority has been out of power for an extended period, its members are more likely to dismantle unsatisfactory status quo policies enacted over prior congresses. In accordance with this expectation, I find that for every additional congress a majority was out of power before gaining control of the House, extant provisions face an 8.3 percent increase in the probability of being repealed. In other words, repealing activity increases when a new majority seizes control of the House in proportion to the length of time they were previously in the minority. The preponderance of evidence for provisions enacted between 1879 and 2012 shows that switches in control of the House precipitate repeals, especially when the current majority had been out of power for a long period.

The model also included controls for Congresses' legislative productivity and their attempts to enact titles of the United States Code into positive law. Whereas I find that Congresses' productivity is not proportionally related to their repeal activity, their efforts to enact positive law titles are strongly and significantly related to their repeal activity. Congresses that engage in efforts to enact titles as positive law are far more likely to repeal a large number of provisions than are congresses who do not attempt to enact titles as positive law. Positive law codification efforts are one of the strongest predictors of Congresses' repeal activity. Readers will observe that this finding holds across all models.

Due to the size of the datasets required for survival analysis in this chapter, I lacked the computing power required to visualize the predicted probabilities for changes in key

indicators, while holding all other indicators at their means or other specified values. As a result, I do not include visualizations of predicted probabilities or model specific survival curves in this chapter outside of a few key figures. Although I was unable to visualize the substantive effects of indicators included in the 1879 to 2010 model, I am able to visualize the overall survival function for its included provisions (see Figure 36).

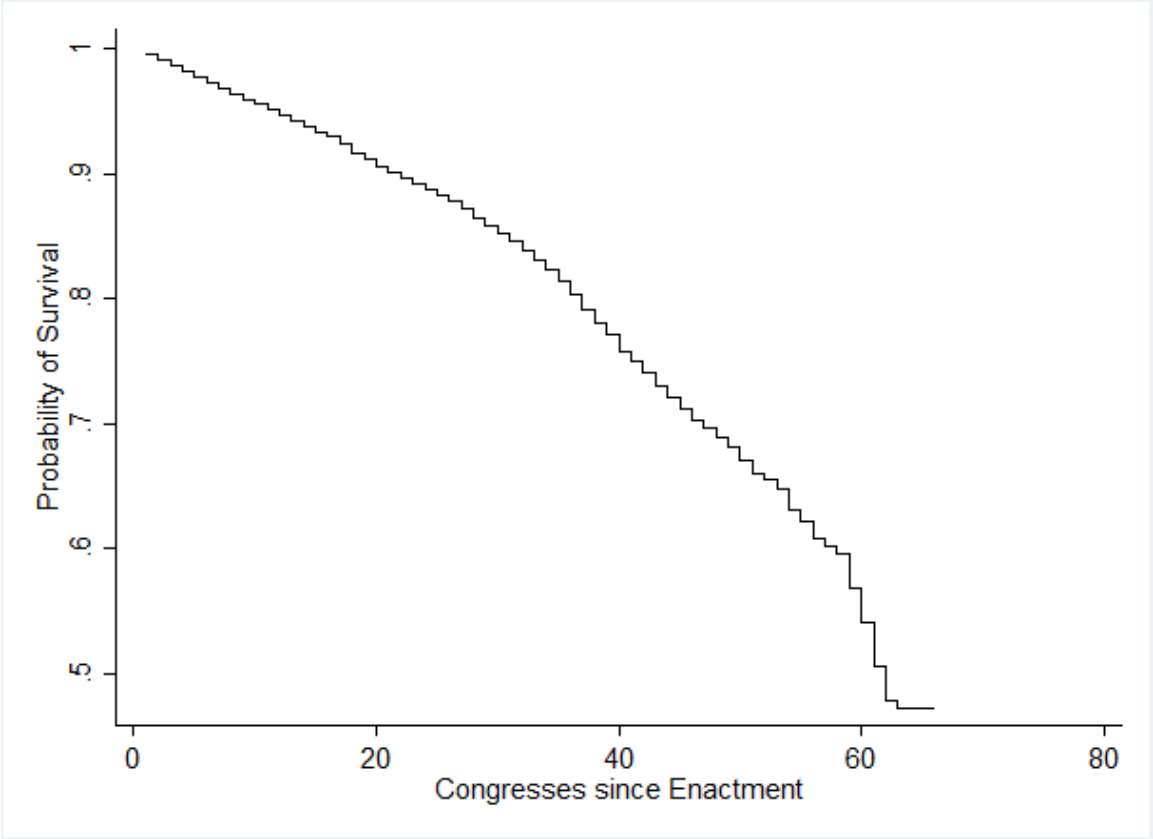


Figure 36: Cox Proportional Hazard Survival Function (1879-2010).

Unlike Figure 32, which plotted the daily probability of survival, Figure 36 plots the probability of survival for a provision with each congress after its enactment. The probability that a provision will survive declines with each subsequent congress, and

rapidly declines after provisions survive 58 congresses. While the shape of the curve suggests that provisions are most durable immediately after they enacted, this is an artifact of excluded data, the implications of which are discussed below.

A total of 4,549 provisions are excluded from the first Cox proportional hazard model (1879-2010) and consequently the survival function in Figure 36 because they were enacted by the same Congress that repealed them. There is no change in the values of any of the time-varying covariates for these observations. Substantively, these provisions are among the least durable. Congress repealed them less than two years after it enacted them. It is not within the scope of this project to investigate their attributes beyond noting that the repeal of so many provisions immediately after their enactment lends evidence to the postulate that Congress is most likely to repeal provisions either immediately after it enacts them or many years after the fact. This pattern is characteristic of the sharp increase in the probability of repeal that Ragusa finds immediately after passage, followed by a monotonically declining risk of repeal in later years (2010). My findings corroborate this earlier finding as well as put a precise value on the magnitude of its effect. Of 29,155 repealed provisions between 1879-2010, Congress repealed over fifteen percent (4,549) within two years after enacting them.

Modern Legislative Durability (1973-2010)

The survival model presented in this section includes provisions Congress enacted between 1973 and 2010. As was the case in Chapter 5, this shorter time-span enables me to include indicators for the consideration of a bill as it makes its way through Congress. The model includes variables for how many restrictive rules Congress passed during the consideration of legislation, how many committees the legislation was referred to and how much time lawmakers had to consider the content of the proposed reform, as measured by the period between the bill's introduction and its enactment. In this chapter, I can add crucial element to my analysis, changes in the public's preference for a more or less active federal government over time. The hazard ratios for this model, including the estimate for the effect of the public's mood on legislative durability, are presented as a forest plot in Figure 37.

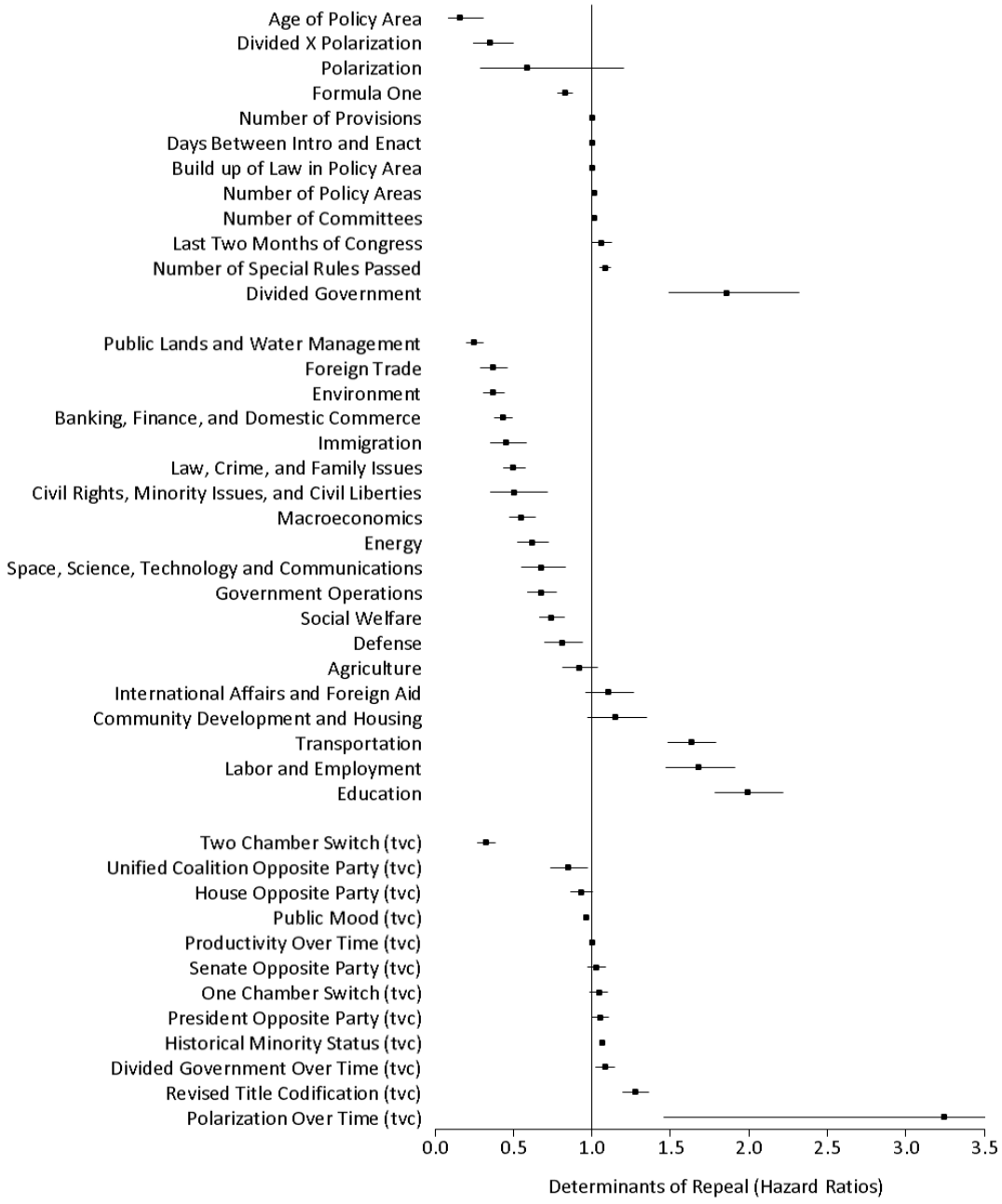


Figure 37: Forest Plot of the hazard ratios for the determinants of repeal (1973-2010).

The indicators for political phenomena that are contemporaneous with or occur prior to enactment are almost identical across the 1879-2010 and the 1973-2010 survival models, with small changes to the magnitudes of the effects. Similarly, the results for the time-varying covariates are alike, with the notable exception of the age of the policy area. The estimate for the effect of Congress's experience legislating in particular policy areas switches direction again. This change puts it in alignment with the preponderance of evidence in chapter 5, which suggest that as Congress gains more experience in a policy area, it can enact more durable provisions. There are also key differences between the two survival models with regard to the predicted effect that the policy area of a provision has on its durability.

When examined across the full span of U.S. history, older functions of government appear to be the least durable, however, when the focus is narrowed to modern lawmaking, this trend shifts. I find that for provisions enacted since 1973, newer functions of the federal government, including community development and housing, labor and employment, and education are among the least durable. This pattern corroborates earlier findings regarding differences in the durability of policy areas between historical and modern lawmaking presented in Chapter 5.

Despite moving to an alternant model specification, the evidence still suggests that the most durable provisions are referred to multiple committees and considered under regular House rules. However, the indicator for the potential time Congress has to deliberate on public measures, the number of days between a law's introduction and its enactment, is statistically insignificant. Within the context of this model, the potential time Congress has to consider legislation does not impact the durability of provisions.

I have plotted three survival functions from the modern lawmaking model. The first function, in Figure 38, plots the probability of survival for a provision with the passage of

each subsequent congress after enactment. The remaining functions, plotted together in Figure 39, show that the probability of a provision's survival is conditional on the liberalness of the public's mood across time.

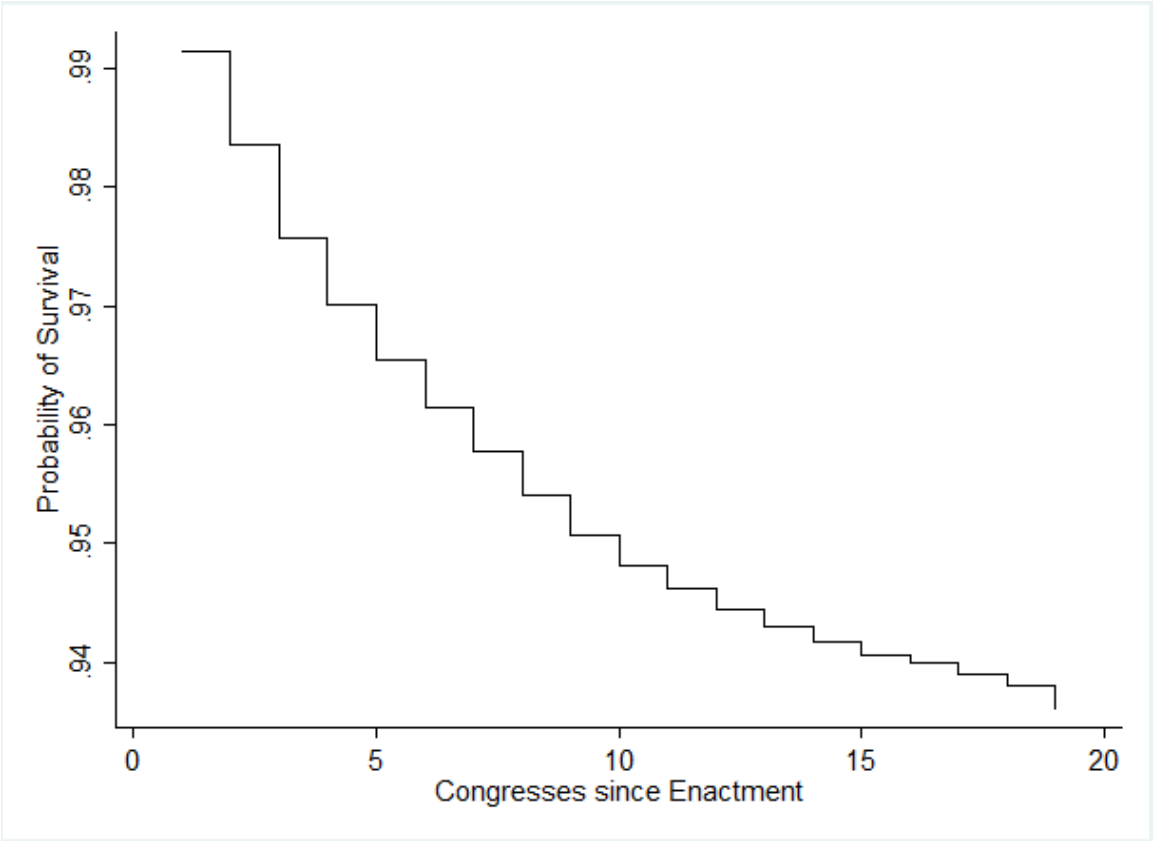


Figure 38: Cox Proportional Hazard Survival Function (1973-2010).

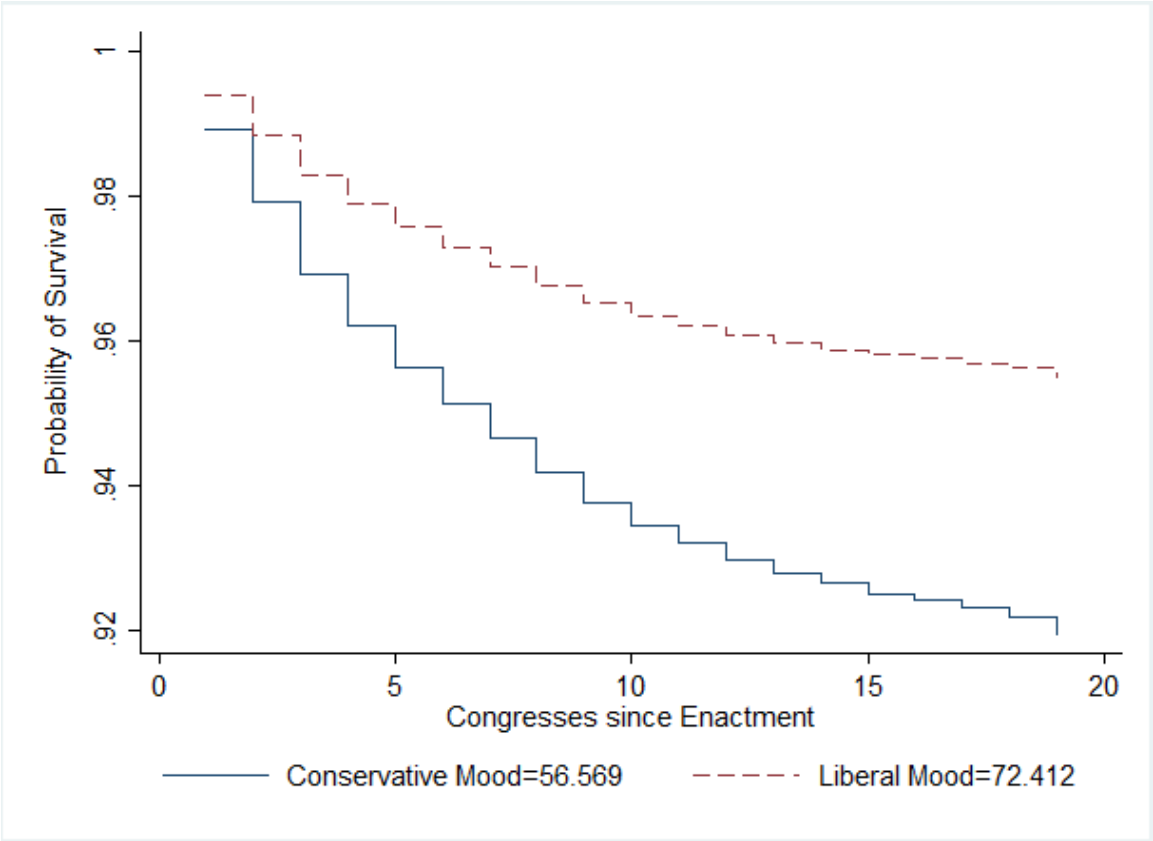


Figure 39: Probability of Survival given changes in Public Liberalism (1973-2010). The more liberal the public is, the less likely Congress is to repeal provisions. Conversely, the more conservative the public is, the more likely Congress is to repeal provisions.

Given Congress' role as intermediary between the public's preferences and government action, changes in the public's preferences for more or less government are a significant challenge to the durability of federal provisions of law. Specifically, the relative probability of a provision's survival decreases as the public's mood becomes more conservative. Conversely, the relative probability of a provision's survival increases as the public's mood becomes more liberal. The effect size ranges from a difference of one percentage point change in the probability of survival to a difference of five percentage points. Controlling for all other indicators, when the public has a preference for less

government, Congress repeals a greater number of extant provisions of law. When the public has a preference for more government, Congress repeals fewer provisions of law.

DISCUSSION

The primary advantage of survival analysis is its ability to account for the passage of time. In particular, the preceding models have enabled me to analyze the impact of political variables that change over time on the durability of federal provisions. By adopting a survival analysis framework, I can account for how shifts in control of government and the public's mood affect the durability of provisions.

One of the central findings from this chapter is that the composition of subsequent congresses conditions the likelihood that a provision will endure. I have consistently found that unified governments are more likely to repeal provisions that were enacted when the opposing party controlled government. This mirrors findings from Chapter 5, but does so using an alternate model specification. The results are mixed when it comes to the effect of changes in a single chamber or branch. Across two periods of lawmaking (historic & modern) the direction and magnitude of these effects vary. For the durability of the oldest provisions, oscillations in control of the House undoubtedly matter. For provisions enacted by the modern Congress, isolated oscillations in control of either chamber or the executive do not exert a significant effect on durability. I have suggested that is because gaining unified control of government enables parties to pursue their policy aspirations to a greater degree than gaining control of a single chamber of Congress or the Executive does.

Whereas the effects for gaining control of part of government are mixed, the effect of the time spent in the minority in the House is clear and consistent. The longer a party is in the minority, the more likely they are to repeal a greater number of provisions once they gain control of the House. In other words, switches in control of the House precipitate

repeals, in proportion to the time the current majority had been out of power. This results in a negative effect on the durability of provisions enacted before delayed shifts in control of the House.

The second central finding from these survival models is that legislative durability is dynamically related to the public's mood. After provisions are enacted, the public's preferences for a more or less active federal government impact the likelihood that a provision will continue to endure. Specifically, Congress responds to a more conservative public mood by increasing its repeal activity, whereas it responds to a more liberal public mood by decreasing its repeal activity. Given the recent trend toward a more conservative public mood, this pattern suggests that Congress has a greater incentive to repeal provisions now, then it did ten years ago.

Chapter 7: Conclusion

This project began with a simple question, "What makes law last?" In the last few chapters, I have endeavored to provide a partial answer to that question by suggesting that provisions of federal law are most likely to last when legislators consult diverse sources of information, deliberate on the merits of public policy, and come to a substantive compromise. Using a dataset that maps the durability of every provision of federal law since the founding, I uncovered several systematic determinants of durability.

On Information and Deliberation

It should come as little surprise that thorough information gathering and unhurried deliberation enables lawmakers to craft lasting law. Information helps lawmakers identify solutions that solve problems in the long term while minimizing the unintended consequences that undermine poorly crafted legislation. Congress may gather information from many different actors who intersect with the legislative process, including congressional witnesses, committee and member staffs, subject matter experts, and concerned citizens. It may also come from less obvious sources.

Ideologies serve as reservoirs of information concerning the possible effects of courses of action and theories about the long-term consequences of policies. Different information often underlies different perspectives about what constitutes good public policy. Lawmakers are exposed to new information when they debate policy with those with whom they disagree. When conservatives deliberate with liberals, each sides' arguments carry new information into the policy debate and may uncover the grounds for a compromise. Such potential vanishes in the dearth of bipartisan interaction that characterizes our modern Congress. Lawmakers who reside in ideologically homogenous

vertical niches, avoid the discomfort that accompanies having to take ones' opponents' arguments seriously and thereby sacrifice exposure to the additional information that may help them craft durable policies. Lawmakers who sincerely debate the virtues of a policy with members of the "other team," eschew ideological homogeneity, in favor of heterogeneity of opinion that better informs policy making. Deliberation amongst ideologically heterogeneous individuals may be the only way to uncover the common ground for a compromise. By actively seeking out diverse sources of information and deliberating with those with whom they disagree, lawmakers take the first steps in crafting durable law.

Given the central role that committees play as both venues for information processing and deliberation, I have argued that multiple referrals should bolster the durability of the resulting law. Multiple referrals increase the information gathering capacity of Congress' committee structure and multiples the number of individuals who have a say in the design of nascent legislation during this crucial stage. Although the House no longer facilitates deliberation and debate amongst all its members in the committee of the whole, it comes closest to approximating expansive participation in the legislative process when it refers bills to multiple committees. The findings from the logit and event history models demonstrate that provisions do indeed last longer if the parent bill is referred to multiple House and Senate committees before it is enacted. This supports the argument that diverse information, the participation of a greater number of actors, and multiple forums for deliberation help Congress craft durable law.

Beyond venues for information gathering and deliberation, Congress also needs sufficient time to engage in these activities. Bills need to be introduced early enough for rank and file members to consider their content and for committees to hold hearings, gather information, and deliberate on the proposed measure. Hastily passed legislation and

eleventh-hour votes are recipes for ephemeral law. The empirical results show that the most durable provisions have a longer period between their introduction and enactment and are voted on before the last moments of a Congressional session. This gives lawmakers the time they need to engage in the activities that bolster legislative durability; gathering information, deliberating and identifying potential areas of compromise.

The results also demonstrate that experience matters. More durable provisions tend to be enacted after Congress has gained institutional experience in the relevant policy area. All else being equal, laws enacted in relatively new policy domains, like internet regulation, are less durable than those enacted in established and well-understood domains, like transportation. In general, a lawmaking process characterized by diverse information and sufficient time for deliberation produces long lasting law.

On Compromise

The American political system was designed to facilitate compromise and thus encourages gridlock in the absence of bipartisan solutions to problems. The Founders revealed this intent by designing a policy process that is slowed by multiple veto points and super-majoritarian procedures, which encourage the triumph of reason and compromise over the momentary passions of the majority (Weiner 2012). Deliberation may uncover the grounds for a compromise, but lawmakers must make sacrifices in their preferred policy positions to realize that compromise. Borrowing from Bessette (1994) and Gutmann and Thompson (2013), I have defined a compromise as an agreement born of reasoning on the merits of public policy, in which all sides sacrifice something in order to improve on the status quo from their perspective, and in which the sacrifices are at least partly determined by the other side's will. I added to this that a substantive compromise

requires that each side's sacrifice take the form of a shift in its preferred policy position in legislation. When lawmakers sacrifice their unadulterated policy preferences in favor of compromise, they tend to enact durable law. A seemingly messy legislative process produces a durable product. Laws that represent a substantive compromise between the diverse interests that characterize the United States Congress are less likely to have their provisions targeted for repeal or omission by subsequent political actors. The Supreme Court, Presidents, executive agencies, and future congresses are all less likely to undermine a policy that enjoys bi-partisan support. Whereas, partisan policies are more likely to be dismantled when control of the branches of government changes hands. When the majority acts in accordance with the responsible party government model and forces their will on the minority, Congress tends to enact ephemeral law.

In general, the results show that a democratized House provides some of the most fertile ground for compromise. Durable laws are likely to be considered under open rules, which give more lawmakers, particularly members of the minority, influence over the law's provisions. When members of the majority party do not attempt to dominate the minority through the rules process in the House, the resulting legislation is more durable. On the other hand, when the majority party uses restrictive rules to enact their agenda over the heads of minority members, the resulting law is more ephemeral. If lawmakers remain ensconced in their ideological niches, they never learn the art of compromise and never realize its benefits.

The national government has always been a high-friction system, requiring compromise, that sees friction increase further still when the two dominant political parties are ideologically distant, and the branches are divided. The results show that when friction is highest, and government is at its most polarized, and divided, is precisely when the legislature produces the most durable law. In the case of divided governments, when

polarization is low, the resulting law is more ephemeral. In the case of unified governments, the majority has little incentive to compromise with the minority. Provisions enacted by unified governments are less likely to be repealed by subsequent Congresses but are more likely to have their provisions omitted by the Supreme Court, the Executive, Congress, or federal agencies. In general, the more friction there is in group decision making, the more important compromise becomes to securing any outcome other than the status quo.

In addition to general conditions of polarization and unified or divided government, the results also demonstrate the effect of a somewhat more direct measure of compromise. When controlling for all else, the proportion of legislators voting 'aye' on final passage is positively related to legislative durability. The greater the number of legislators who support a policy, they less likely it is to be repealed or omitted after passage. Given Congress's reliance on omnibus legislation, logrolling, and voting on legislation before having read it, the proportion of legislators voting for passage is an imperfect indicator of the proportion of legislators who are truly and sincerely in favor of the policy. Nevertheless, the findings show that when controlling for the use of omnibus legislation, at least, the number of votes for a law is positively related to its durability.

On Omnibus Legislation

One of the greatest threats to the durability of federal law is Congress's insistence on packaging unrelated bills as omnibus legislation. Logrolling, omnibus legislation, and the inclusion of non-germane provisions enable Congress to enact separable policies that could not have been enacted on their own merits. The regular passage of provisions that have been given scant consideration and are not the result of a substantive compromise fail to attract the type of vigorous support that sustains them beyond their initial enactment. If

most legislators have little interest in passing a provision, they have less interest still in expending political capital to sustain it. Consequently, provisions within omnibus legislation and non-germane provisions are repealed or omitted at higher rates than single subject legislation and germane provisions. These results point toward the value of designing shorter and more policy focused legislation, which represents a substantive compromise among legislators for more lasting policy change.

Durability Over Time

An enduring feature of the American politics is that control of the various branches of the federal government rarely remains in the same hands. One of the core findings yielded by the survival models is that shifts in control of government are predictive of Congress's willingness to repeal legislation. Specifically, shifts in control of the House are predictive of repeals over a long span of U.S. history. Similarly, the volume of repeals is associated with the length of time a recently minted majority was previously in the minority. The longer a party is in the minority before assuming majority control, the more likely they are to repeal the policies of the other party immediately after gaining control. Another enduring feature of American politics has been vacillation in the public's desire for a more or less active federal government. The survival models demonstrate that Congress' repeal activity is dynamically related to public mood. As the public mood becomes more conservative, Congress repeals a greater number of provisions. As the public mood becomes less conservative, Congress repeals fewer provisions.

Repealing Extant Law

In addition to identifying the processes and political conditions that produce the most durable law, this project demonstrates when and how Congress is most successful at repealing or nullifying existing law. Congress is most successful at repealing large portions of extant law when lawmakers attempt to enact a non-positive law title of the United States Code as positive law. By enacting titles of the Code as positive law, Congress revisits past laws and restates them using a more consistent drafting style that resolves inconsistencies, eliminates duplicate provisions, clarifies ambiguity, updates policies, and often omits or repeals unnecessary or outdated provisions. During this process, Congress frequently repeals or omits up to fifty percent of a title's provisions. This amounts to the removal of many hundreds of pages of law and federal regulations from the legal corpus. Presently, the U.S. Code is predominantly comprised of non-codified law titles, which would benefit from a thorough purge of outdated, or ineffective provisions.

Practical Application

This project connects the vagaries of congressional procedure to the tangible effect these processes have on the durability of laws and stability of our legal corpus. Its findings have practical implications for those who want to pass durable law and for those who want to repeal or nullify existing law. Passing durable law requires that legislators refrain from using omnibus legislation as a vehicle for controversial provisions, convince a supermajority of legislators to compromise on the substance of legislation, and adopt procedures that democratize the House and encourage deliberation. The closer Congress comes to embodying these precepts, the more likely it is to produce durable law.

Unsurprisingly, many of the parliamentary procedures and norms that conspire to produce durable laws are the same as those advocated for and prescribed by the American

Founders and codified in early guides to parliamentary procedure, such as Jefferson's Manual of Parliamentary Practice. Most notably, early Congresses deliberated at length before voting on a bill, favored a democratized House that empowered minority members, considered legislation under what we would now refer to as open rules, addressed a single topic in each bill, and attempted to identify the grounds for a compromise on a subject before drafting a bill (Jefferson 1801b, Cooper 1970, Polsby 1968, Hedlund 1984). The modern Congress has discarded these procedures in the name of efficiency and productivity, allowing its members to secure the passage of controversial legislation. A deviation from earlier procedures may allow Congress to "get things done." The price to be paid for pursuing this mode of productivity, however, is less durable law.

In an era of polarization and hyper-partisanship, the modern Congress often employs "unorthodox" legislative procedures to pass legislation (Sinclair 2012). Such procedures are "unorthodox" because they are deviations from the long-standing regular order of the House or established norms in the Senate. The majority party relies on these procedures to pass a legislative agenda that is minimally adulterated by the minority's views. Put another way; such procedures are designed to circumvent the need for compromise. Under the direction of the majority party leadership, the House Rules Committee frequently crafts restrictive rules, designed to stymie the input of minority members. Both chambers resort to combining proposals that cannot be enacted on their merit into massive omnibus bills or as riders onto must-pass legislation. Whether by restrictive rules in the House or non-germane amendments in the Senate, provisions and whole bills often bypasses committee consideration and are not subjected to a thorough review before Congress enacts them. With the significant exception of multiple referrals, which boost durability, laws that are enacted using unorthodox procedures are much more likely to have their provisions repealed or omitted. The very procedures that the modern

Congress relies upon to speed up the policy process and pass legislation with the support of bare majorities, reduce legislative durability.

Despite its larger membership, were the House to function more like its individualistic counterpart, the Senate, Congress would likely enact fewer laws, but those it did enact would last longer. The Senate filibuster encourages the formation of supermajority coalitions and allows for unlimited debate unless cloture is invoked. Unless constrained by a complex unanimous consent agreement, the rules of the chamber enable any Senator to offer amendments to legislation, thereby ensuring that every Senator may influence the design of the law in every policy domain. Proponents of a speedy, responsive, or agile Congress often lament these features because they block "progress," although my research demonstrates that they are among the harbingers of durability. When Congress actively seeks out diverse information, slows its legislative process, thoroughly deliberates on a measure, and adopts procedures that encourage wide participation and supermajority enacting coalitions, it tends to enact durable law.

Critics of compromise are quick to argue that little would ever get done if the majority didn't force its will on the minority during brief windows of opportunity. I refer them to the statement of one House member, "Anyone who thinks that compromise is a dirty word, should go back and read one of the fascinating accounts of all that happened in Philadelphia in 1787" (when the United States Constitution was drafted). The Constitution is a document born of conflicting principles, fervent debate, and finally compromise (Riker 1996, Robertson 2005; Elkins, Ginsburg and Melton 2009). Partially as the result of compromise and spare language, the Constitution represents the most durable law in the United States and the most durable governing document in the world (Elkins, Ginsburg and Melton 2009). It should come as no surprise that some of the same principles that guided its enactment are posited here as harbingers of legislative durability. In a system of

separated powers and competing political philosophies, a compromise will stand the test of time.

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